

# Legal Ethics in International Criminal Defense

Jenia Iontcheva Turner \*

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\* Associate Professor of Law, SMU Dedman School of Law. I thank Anthony Colangelo, Nathan Cortez, Kevin Jon Heller, Eugene Kontorovich, D. Aaron Lacy, Máximo Langer, David McGowan, Fred Moss, Jide Nzelibe, Sonja Starr, Beth Thornburg, John Turner, and participants in the Northwestern Law School International Law Colloquium, the 2009 Junior International Law Scholars Roundtable, the SMU Maguire Center Public Scholar Lecture Series, and the 2009 Annual Meeting of the Law & Society Association for their helpful comments on this project. I am also grateful to SMU Law School for supporting this project with a George Ellis Endowed Faculty Research Fund grant and to the SMU Maguire Center for Ethics and Public Responsibility for supporting the project with a Public Scholar grant.

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## I. INTRODUCTION

Lawyers around the world face difficult ethical questions when seeking to balance zealous representation of their clients with their duties to the justice system. The tensions between the lawyers' duties to clients and to the court are especially pronounced in criminal defense. Criminal cases pit the government—often a formidable adversary—against individuals with less power and typically far fewer resources. If the government abuses its power, the consequences for the defendant can be enormous. To counter the dangers of unfair prosecutions, many legal systems give defense attorneys greater leeway to represent clients aggressively in criminal cases—even to the point of permitting practices that would not be tolerated in civil cases and would be downright abusive if attempted by the prosecution.<sup>1</sup> Criminal defense attorneys must determine where the limits of ethical practice lie in each case, and how closely they can approach these limits to provide the client with a vigorous defense.

In international criminal trials, attorneys face new and potentially more complex ethical dilemmas. The goals of international trials are broader and more political than those of ordinary domestic trials, and the applicable procedures are a unique hybrid of the inquisitorial and adversarial traditions. Yet existing Codes of Conduct fail to take into account these special features of the international criminal justice system and often fail to offer adequate guidance to attorneys. As attorneys decide how to balance their duties to their clients and to the court, they are generally left to act according to their own diverse domestic traditions. This Article examines the ethical dilemmas of defense attorneys at international

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<sup>1</sup> Meredith Blake and Andrew Ashworth, *Ethics and the Criminal Defense Lawyer*, 7 Legal Ethics 167, 168 (2004). The American Bar Association's Model Rules of Professional Conduct, for example, give criminal defense attorneys greater leeway to make meritless claims or contentions and to introduce evidence (specifically the defendant's testimony) that they reasonably believe is false. Model Rules of Professional Conduct ("MRPC") R 3.1, 3.3 (ABA 2009). For a classic debate about the appropriate ethical regulation in the context of criminal defense, consider William H. Simon, *The Ethics of Criminal Defense*, 91 Mich L Rev 1703 (1993); David Luban, *Are Criminal Defenders Different?*, 91 Mich L Rev 1729 (1993).

criminal courts and offers a new approach to resolving several of them, which is consistent with the unique features and purposes of international criminal trials.

The traditional conception of criminal defense advocacy in England and America was captured in the vivid (and endlessly cited) statement of Lord Brougham in 1820:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.<sup>2</sup>

The notion that an advocate owes no allegiance to any principles other than those imposed by the law—and must subordinate all other considerations to that of advancing the interests of the client—is perhaps the dominant understanding of criminal defense representation in adversarial systems. Indeed, aggressive advocacy at the limits of the law is sometimes itself taken to be an ethical duty of defense attorneys. Some have read Lord Brougham to mean that “everything not forbidden is required.”<sup>3</sup> The Model Rules of Professional Conduct (Model Rules) do not take things quite this far. While requiring that advocates zealously protect and pursue their clients’ interests, the Model Rules also provide that lawyers are “not bound . . . to press for every advantage that might be realized for a client.”<sup>4</sup>

Several considerations might be understood to lie beneath the more moderate position expressed in the Model Rules. First, an attorney who understands it to be his duty to press for every advantage that is arguably legal will often find himself positioned on a razor’s edge—attempts a delicate balance between his duty of zealous representation and his duties to the court (and the attendant prohibitions on practices such as delay tactics, frivolous arguments, and subornation of perjury). Second, a lawyer must also evaluate whether certain aggressive tactics will in fact advance the interests of his client, or whether engaging in them is more likely to alienate the court and the jury, prevent beneficial negotiations with the prosecution, or result in a loss of

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<sup>2</sup> 2 Trial of Queen Caroline 3 (James Cockcroft & Co 1874).

<sup>3</sup> Albert W. Alschuler, *Lawyers and Truth-Telling*, 26 Harv J Law & Pub Poly 189, 191 (2003) (observing that many defense lawyers adopt this interpretation); Alan M. Dershowitz, *Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System* 145 (Simon & Schuster 1996), cited in id; see also Simon, 91 Mich L Rev at 1703 (cited in note 1) (defining aggressive advocacy as “doing anything arguably legal to advance the client’s ends”).

<sup>4</sup> MRPC, pmbl, R 1.3 cmt 1 (cited in note 1).

credibility that harms the client's cause. Finally, every thoughtful defense attorney must wrestle with the difficult moral issues that accompany representation of clients who are, in most cases, guilty. No less an adherent of zealous defense than Alan Dershowitz has acknowledged, "if you're a decent human being and you've been a victim of crime yourself and you have family members that have been victims of crime, you feel tremendous turmoil."<sup>5</sup> All of these difficulties weigh in favor of allowing defense attorneys greater flexibility than would be allowed under the philosophy of "if it is permitted, it is required."

This Article does not propose to address the debate about how these issues should be resolved in the domestic adversarial system, a topic that has been thoughtfully addressed by many scholars and practitioners over the years.<sup>6</sup> Instead, the Article examines the question of how these considerations translate to the field of international criminal defense. Specifically, are there particular features of international criminal courts that suggest different approaches to any of the ethical questions that a defense lawyer confronts? Must a defense attorney who adheres to the school of maximum aggressive advocacy when practicing in an American court feel duty-bound to adopt the very same tactics when practicing in an international court? Is any other approach acceptable?

I argue that distinctive features of international criminal courts and prosecutions suggest a more flexible approach to the ethical norms governing defense advocacy, closer to that embodied by the Model Rules. Moreover, I suggest that international criminal courts should promulgate guidelines which convey to defense attorneys that particular aggressive practices are not required by ethical duties and that such practices may be more inconsistent than consistent with good defense lawyering. I do not propose additional rules that would absolutely prohibit such practices in international courts. Nor do I suggest that defense attorneys should ever fail to diligently and zealously represent their clients, or that any ethical guideline should permit such a failure. I do, however, argue that in some of the areas that lie on the far reaches of aggressive representation, international defense attorneys should be permitted greater latitude than would be countenanced by the view that advocacy must always be pursued to the very limits of legality.

To be sure, many of the considerations that call for aggressive representation of criminal defendants at the domestic level hold true

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<sup>5</sup> Cheryl Lavin, *Pleading His Case: Alan Dershowitz Talks About the Gray Area Where Lawyers Live*, Chi Trib C1 (Feb 1, 1995).

<sup>6</sup> See, for example, Alschuler, 26 Harv J Law & Pub Poly at 189 (cited in note 3); Luban, 91 Mich L Rev at 1729 (cited in note 1); Simon, 91 Mich L Rev at 1703 (cited in note 1); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 Hofstra L Rev 925, 934 (2000).

internationally as well. Like most domestic courts, international criminal courts aim to provide fair trials, consistent with defendants' rights to be presumed innocent and effectively represented. To ensure the full realization of these procedural rights, one may argue that international criminal defense attorneys are duty-bound to press for any advantage within the limits of the law.

Yet international criminal trials, to a greater degree than domestic trials, serve goals beyond that of determining guilt or innocence according to fair procedures. These goals include providing an authoritative record of the crimes for posterity, giving victims a forum in which to express their grief and outrage, spreading support for human rights, and promoting peace and reconciliation.<sup>7</sup> While it is not the job of the defense attorney to promote these broader goals, they nonetheless at times suggest different approaches to the regulation of defense attorney conduct.<sup>8</sup>

In addition, practice at international criminal courts—particularly the International Criminal Court (ICC), which is the focus of this Article's recommendations<sup>9</sup>—is based on a new procedural model that combines inquisitorial and adversarial features. Compared to its adversarial counterpart, the inquisitorial tradition generally takes a more reserved view of advocacy. It gives judges important powers and responsibilities that belong to defense attorneys in adversarial systems, and it expects less aggressive and partisan conduct from defense attorneys.<sup>10</sup> To the extent that international criminal procedures incorporate these inquisitorial features, it is sensible to adjust ethical guidance accordingly.

Finally, two justifications commonly given to support aggressive advocacy domestically—particularly in the US—appear less applicable internationally. Many American criminal defense attorneys are so overwhelmed with cases that they do not provide zealous (or even adequate) representation to their clients. To discourage such disengaged advocacy, some commentators have called for

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<sup>7</sup> See Section II.A.

<sup>8</sup> Defense attorneys generally believe that international criminal courts should focus on providing fair trials to the accused and not be distracted by broader political goals. The attorneys are nearly unanimous in their view that the defense should not be charged with advancing any of these broader goals. At the same time, as I discuss in Section IV, many defense attorneys are inclined to accept the specific limitations on defense attorney conduct suggested by these broader political goals.

<sup>9</sup> Because of the pending closure of the other two modern international criminal tribunals—the International Criminal Tribunal for Yugoslavia ("ICTY"), which is currently scheduled to complete trials by early 2012, and the International Criminal Tribunal for Rwanda ("ICTR"), which is scheduled to complete trials by 2010—the ICC is the court that is likely to handle most international criminal cases. For that reason, these recommendations are addressed primarily to the ICC.

<sup>10</sup> See Section II.B.

strengthening and reinforcing ethical obligations of aggressive representation. But international criminal defense attorneys, as a rule, already provide a great deal of individual attention to their clients. They do not generally need to be exhorted to be more partisan and aggressive. Similarly, the argument that attorneys for guilty clients should be aggressive advocates in order to protest unjust punishments is less persuasive at the international level. International courts do not impose the death penalty and are not bound by harsh mandatory sentencing laws, despite the extraordinary seriousness of the crimes they adjudicate.

Professional regulation of defense advocacy at the international courts should take account of these special features and goals of the international criminal justice system. I address how this purposive approach to legal ethics would apply to four key decisions that international criminal defense attorneys may face: 1) whether to impeach victim-witnesses whom they know to be telling the truth; 2) how to respond to clients who want to testify falsely; 3) whether to allow clients whom the lawyer believes to be innocent to plead guilty; and 4) whether to follow clients' instructions to boycott or disrupt the proceedings.<sup>11</sup> In some cases, the purposive interpretation may result in less aggressive advocacy than might be warranted in an ordinary domestic criminal case. In others, it may demand a more independent approach to making decisions about the client's representation.

To implement the purposive approach set out in this Article, I propose including a commentary to international courts' Codes of Conduct (particularly the ICC Code), which would define more precisely the boundaries on aggressive practices, working within existing rules. The commentary would not create new categories of sanctionable conduct. Instead, it would lay out situations in which attorneys are not required to engage in certain aggressive tactics or follow certain client instructions. In some cases, it would also recommend a particular course of action as most consistent with the attorneys' ethical obligations, while leaving some flexibility to attorneys in how they interpret their duties before the ICC.

This Article does not propose to resolve conclusively all major ethical dilemmas that confront international criminal defense attorneys. But by opening up a conversation about the appropriate framework within which legal ethics questions should be understood at international criminal courts,<sup>12</sup> it offers a

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<sup>11</sup> See Section III.

<sup>12</sup> International criminal law scholarship has so far largely neglected the subject of legal ethics. The few exceptions to this rule have focused on specific ethical questions facing defense attorneys and have not aimed to provide a more comprehensive framework for legal ethics at international criminal courts. See, for example, Nina H.B. Jørgensen, *The Problem of Self-Representation at International Criminal Tribunals*, 4 J Intl Crim Just 64, 73 (2006); Daniel D. Ntanda Nsereko, *Ethical Obligations of Counsel in Criminal Proceedings: Representing an Unwilling Client*, 12 Crim L F 487, 501

coherent way to evaluate and resolve these questions according to the objectives of the justice system in which they arise.

## II. DISTINCTIVE FEATURES OF THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

### A. Goals of International Criminal Trials

The question of proper ethical practice at international criminal courts necessarily involves a discussion of the objectives of these courts. International criminal trials aspire to achieve multiple goals.<sup>13</sup> As I have argued elsewhere, these goals can be broadly divided into legal and political.<sup>14</sup> From a legalist perspective, the main function of trials is to determine individual culpability and assess appropriate punishment through a fair process.<sup>15</sup> Punishment of the guilty, in turn, serves the goals of retribution, deterrence, and incapacitation.<sup>16</sup> Under the legalist view, justice demands that the trial focus on the evidence bearing on the guilt or innocence of the accused and keep examination of broader contextual questions to a minimum. Most international criminal defense attorneys tend to accept this view.<sup>17</sup>

Still, international criminal courts, as well as many academic commentators, reject the exclusively legalist focus on individual culpability and fair procedures as too narrow.<sup>18</sup> They argue that international criminal law properly plays

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(2001); Jarinde Temminck Tuinstra, *Assisting an Accused to Represent Himself: Appointment of Amici Curiae as The Most Appropriate Option*, 4 J Intl Crim Just 47, 48 (2006). One recent article that offers insightful description of the way ethical norms were created at the ICTY is Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B C Intl & Comp L Rev 139 (2007). Another notable recent publication on the function and ethics of international criminal defense attorneys is Jarinde Temminck Tuinstra, *Defence Counsel in International Criminal Law* (TMC Asser 2009).

<sup>13</sup> Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 Chi Kent L Rev 329, 331 (2008); Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 Va J Intl L 529, 533–44 (2008).

<sup>14</sup> Turner, 48 Va J Intl L at 534 (cited in note 13).

<sup>15</sup> See, for example, Steven Kay and Bert Swart, *The Role of the Defence*, in Cassese, et al eds, 2 *The Rome Statute of the International Criminal Court: A Commentary* 1421, 1421–22 (Oxford 2002).

<sup>16</sup> There is a vigorous debate as to whether punishment, especially in the international context, can actually achieve these goals. Consider Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 Am J Intl L 7 (2001); Julian Ku and Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 Wash U L Rev 777 (2006); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 Fordham Intl L J 473 (1999).

<sup>17</sup> Turner, 48 Va J Intl L at 566–68 (cited in note 13).

<sup>18</sup> See, for example, Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* 112 (1964) (noting that international courts have political aims separate from courts' usual focus on legalism); Tuinstra, *Defence Counsel in International Criminal Law* at 147 (cited in note 12) (concluding that international

additional roles. It aims to serve broader political purposes, such as promoting long-term peace and stability, fostering respect for human rights, creating a historical record, and providing closure for victims and communities affected by the crimes. While courts and commentators have identified many competing goals, they have offered little guidance as to how to prioritize among them.<sup>19</sup>

This complicates judgments about substantive, procedural, and ethical rules in international criminal courts. Confusion is most likely to occur when the broader political aims of international criminal trials clash with the goal of adjudicating individual culpability. For example, the clash between the adjudicative and political goals can deepen tensions between attorneys' duties to their clients and their duties to the court. To understand why it is nonetheless important to accommodate the broader political goals of international criminal law, one must understand how these goals have helped define the law.

At least since the post-Second World War trials at Nuremberg and Tokyo, international criminal trials have been celebrated for helping create an accurate historical record of the crimes. As Justice Robert Jackson, the chief American prosecutor at Nuremberg argued, one of the most important contributions of the Nuremberg trial was to establish "undeniable proofs of incredible events."<sup>20</sup> Others also saw one of the trial's chief achievements as educating local populations about the crimes committed in their name and preventing revisionist accounts of the past.<sup>21</sup>

Modern international criminal tribunals have similarly emphasized that the establishment of an authoritative record can discourage historical revisionism, restore peace, and prevent future acts of aggression.<sup>22</sup> In fact, because of the

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courts tend to pursue policy-implementing goals more than legalist, or conflict-solving, goals); Turner, 48 Va J Intl L at 535-43 (cited in note 13).

<sup>19</sup> Recently, commentators have begun paying greater attention to this question and have begun to suggest ways to prioritize objectives. Consider Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge 2007); Mark J. Osiel, *Making Sense of Mass Atrocity* (Cambridge 2009); Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 BC L Rev 1 (2009); Stephanos Bibas and Bill Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, U of Penn Law School, Public Law Research Paper No 09-10 (Feb 12, 2009), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1381011](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1381011) (visited Nov 21, 2009); Damaška, 83 Chi Kent L Rev 329 (cited in note 13).

<sup>20</sup> International Military Tribunal, Nov 21, 1945, Morning Session, in 2 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 Nov 1945-1 Oct 1946, 95, 99 (1947).

<sup>21</sup> See, for example, Shklar, *Legalism: Law, Morals, and Political Trials* at 155-56 (cited in note 18).

<sup>22</sup> See, for example, *Prosecutor v Nikolić*, Case No IT-02-60/1-S, Judgment, ¶ 60 (Dec 2, 2003); UN SCOR 55th Sess, 4161st mtg at 3, UN Doc S/PV.4161 (June 20, 2000) (statement of J. Claude Jorda); Interview by Editorial Board of *Transnational Law and Contemporary Problems* with Richard



value of presenting important historical evidence at trial, some judges at these tribunals have been reluctant to accept guilty pleas, “which may only establish the bare factual allegations in an indictment or may be supplemented by a statement of facts and acceptance of responsibility by the accused.”<sup>23</sup>

Still, some commentators have expressed reservations about entrusting courts with the task of creating a historical record. Their main concern is that the focus on producing a complete historical record may be in tension with the principle of individual culpability.<sup>24</sup> Under traditional notions of criminal law, the trial must focus on the specific charges against the defendant. Evidence of mass complicity, foreign involvement, or even the true origins of the conflict may not be relevant to these charges and may be prejudicial.<sup>25</sup> When the prosecution introduces evidence to establish historical facts beyond those that prove the charges against the defendant, “the temptation is great to hold any given defendant responsible for as wide a swath of destruction as possible.”<sup>26</sup> This tension between compiling an accurate historical record and determining individual culpability has existed since the Nuremberg and Tokyo trials and continues to arise in today’s international criminal proceedings.<sup>27</sup>

International criminal law also serves the important educational purpose of fostering respect for the rule of law and human rights. Commentators have argued that decisions of international criminal courts can “strengthen [ ] a sense of accountability for international crime by exposure and stigmatization of these extreme forms of inhumanity.”<sup>28</sup> As courts consistently denounce international criminal conduct in judgments that claim the respect of relevant local and international constituencies, they help ensure that human rights law will be increasingly followed.<sup>29</sup>

Goldstone, Chief Prosecutor for the ICTY and the ICTR (Dec 13, 1995), in *Living History Interview with Judge Richard Goldstone*, 5 Transnatl L & Contemp Probs 373, 377–78 (1995).

<sup>23</sup> *Nikolić*, Case No IT-02-60/1-S, Judgment at ¶ 61.

<sup>24</sup> Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal L Rev 75, 95 (2005).

<sup>25</sup> *Developments in the Law—The Promises of International Prosecution*, 114 Harv L Rev 1943, 1973 (2001) (noting this tension and citing a number of sources that have acknowledged it); Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U Pa L Rev 463, 560–63 (1995) (pointing out the constraining effects of temporal jurisdiction); Gabrielle Kirk McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, 156 Milit L Rev 30, 44 (1998) (observing that trial records may not reflect the role of foreign actors).

<sup>26</sup> Danner and Martinez, 93 Cal L Rev at 95 (cited in note 24).

<sup>27</sup> Turner, 48 Va J Intl L at 541 (cited in note 13).

<sup>28</sup> Damaška, 83 Chi Kent L Rev at 345 (cited in note 13); see also Drumbl, *Atrocity, Punishment, and International Law* at 173–76 (cited in note 19); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 Intl Crim L Rev 93, 120–24 (2002).

<sup>29</sup> Damaška, 83 Chi Kent L Rev at 345 (cited in note 13).

The educative function of international criminal trials influences debates about procedures and ethical practices at international criminal courts. For example, some have argued that, to strengthen the educational message of international trials, courts ought to “relax [] the bipolar pressures that arise from proceedings organized as a contest of two partisan cases.”<sup>30</sup> According to the proponents of this approach, a shift toward judicially-directed trials would keep inappropriate political arguments at bay and enable the court to send a more coherent message about the importance of human rights, without the many distractions and controversies generated by the party antagonists.<sup>31</sup> But while less adversarial proceedings might permit the court to deliver more easily the message it desires to send, they might also interfere with the defendant’s ability to mount a full and effective defense and to make key choices about his representation.

International criminal courts also aspire to promote peace and reconciliation in the regions affected by their judgments. Many believe that trials can help to break cycles of violence by providing a regularized, peaceful way of settling accounts. As commentators on the Nuremberg trials observed, trials contribute to peace by “replac[ing] private, uncontrolled vengeance with a measured process of fixing guilt in each case, and taking the power to punish out of the hands of those directly injured.”<sup>32</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) has embraced this rationale, observing that “[t]he only civilised alternative to th[e] desire for revenge is to render justice.”<sup>33</sup> By contrast, “impunity of the guilty only would fuel the desire for vengeance in the former Yugoslavia, jeopardising the return to the ‘rule of law’, ‘reconciliation’ and the restoration of ‘true peace.’”<sup>34</sup> The ICTY’s judgment in *Prosecutor v Nikolić* summarizes the argument that trials contribute to peace and reconciliation:

The tribunal was further to contribute to the restoration and maintenance of peace through criminal proceedings. The immediate consequence of such proceedings was the removal of those persons most responsible for the commission of crimes in the course of—and even in furtherance of—the armed conflict. Additionally, by holding *individuals* responsible for the crimes committed, it was hoped that a particular ethnic or religious group (or even political organisation) would not be held responsible for such crimes by

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<sup>30</sup> Id at 357.

<sup>31</sup> Id.

<sup>32</sup> Shklar, *Legalism: Law, Morals, and Political Trials* at 158 (cited in note 18).

<sup>33</sup> The President of the International Tribunal, First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, ¶ 15, UN Doc S/1994/1007, A/49/342 (Aug 29, 1994); see also id at ¶¶ 11–14.

<sup>34</sup> *Prosecutor v Erdemović*, Case No IT-96-22, Judgment, ¶ 58, ¶ 58 n 17 (Nov 29, 1996).

members of other ethnic or religious groups, and that the guilt of the few would not be shifted to the innocent.<sup>35</sup>

A trial may therefore be fully consistent with both the legal purpose of apportioning individual guilt and the political purpose of promoting peace and reconciliation. But if the latter comes to be seen as the primary purpose of international trials, rather than an incidental consequence, this could produce tensions with the adjudicative function of trials. Courts might be inclined, for example, to make sentencing decisions based on the effect they would have on peace and reconciliation and not based on the defendants' relative blameworthiness.<sup>36</sup> An empirical survey of the ICTY and International Criminal Tribunal for Rwanda (ICTR) suggests, however, that to date, these courts have not allowed the goals of achieving peace and reconciliation to noticeably influence their sentencing decisions.<sup>37</sup>

Finally, international criminal trials aim to help survivors of the crimes and the affected communities achieve a sense of closure. Trials serve this function by providing a forum for victims to tell their stories and have the wrongs done to them formally acknowledged.<sup>38</sup> As the ICTY reported in 1997, "witnesses who have come to The Hague have commented afterwards that the opportunity to testify before a duly constituted court has brought them great relief. Justice's cathartic effects may therefore promise hope for recovery and reconciliation . . . ."<sup>39</sup> Even more than its predecessors, the ICC emphasizes the importance of restorative justice and incorporates in its procedures a concern

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<sup>35</sup> *Nikolić*, Case No IT-02-60/1-S, Judgment, ¶ 60.

<sup>36</sup> An example of this tension is the plea agreement between ICTY prosecutors and Biljana Plavšić, the former co-President of the Serbian Republic of Bosnia and Herzegovina, who helped implement the Bosnian Serbs' ethnic-cleansing campaign against Bosnian Muslims and Croats. As part of the plea agreement, the prosecution withdrew genocide charges against Plavšić and argued that Plavšić's guilty plea was "an unprecedented contribution to the establishment of truth and a significant effort toward the advancement of reconciliation." On the basis of this recommendation and related evidence, the court sentenced Plavšić to only eleven years in prison. Bosnian victims of ethnic cleansing were outraged by the low sentence. Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 Vand L Rev 69, 92–93, 93 n 105 (2006).

<sup>37</sup> See Joseph W. Doherty and Richard H. Steinberg, *An Empirical Study of ICTY and ICTR Sentencing: Doctrine Versus Practice*, CELS 2009 4th Annual Conference on Empirical Legal Studies Paper 58–59 (Aug 3, 2009), online at <http://ssrn.com/abstract=1443468> (visited Nov 21, 2009).

<sup>38</sup> *Erdemović*, Case No IT-96-22-T, Sentencing Judgment, ¶ 65 (Nov 29, 1996); *The Promises of International Prosecution*, 114 Harv L Rev at 1970–71 (cited in note 25); Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 Transnat L & Contemp Probs 15, 19 (1997).

<sup>39</sup> The Secretary-General, Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, ¶ 192, UN Doc A/52/375, S/1997/729 (Sept 18, 1997).

for victims' interests.<sup>40</sup> It allows victims to participate in the proceedings, to be represented by attorneys, and to claim reparations.

At the same time, tensions can arise between the desire to give voice and closure to victims and certain procedural rights of the accused. Protective measures for witnesses may interfere with a defendant's right to confront his accusers.<sup>41</sup> Allowing hundreds of witnesses to tell their full stories or to actively participate in the proceedings risks introducing evidence that may not be strictly relevant to the questions at hand and could be prejudicial to the defendant's case.<sup>42</sup> More broadly, some have argued that a focus on the victims deflects from the main purpose of the trial—judging the accused and his deeds.<sup>43</sup>

This last conflict—between victims' and defendants' rights—is often present in domestic trials as well. But for several reasons, it is more pronounced at the international level. First, victims of international crimes are generally more numerous, and the crimes are, on average, more severe and atrocious than the majority of crimes adjudicated in domestic cases. The exceptional severity and magnitude of international crimes tends to magnify the desire to protect victims' interests, even at the expense of defendants' rights.<sup>44</sup> Moreover, victims of international crimes have ordinarily suffered at the hands of a ruthless government. At the domestic level, those who argue for stronger defense rights are usually concerned about the possibility that the government will wrongfully exercise its power against individuals. But at the international level, it is typically the defendants who are accused of abusing state power. For that reason, even “[m]any traditionally liberal actors (such as non-governmental organizations or academics), who in a national system would vigilantly protect defendants and potential defendants, are among the most strident pro-prosecution voices, arguing for broad definitions and modes of liability and for narrow defences . . . .”<sup>45</sup>

In short, several political goals—compiling an accurate historical record, spreading a message of respect for human rights, promoting peace and reconciliation, and giving voice to victims of horrible wrongdoing—have played

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<sup>40</sup> See Jenia Iontcheva Turner, *International Decision, Civil Party Participation in Provisional Detention Appeals, Extraordinary Chambers in the Courts of Cambodia*, 103 Am J Intl L 116, 120-21 (2009).

<sup>41</sup> Consider Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 Am J Intl L 235 (1996).

<sup>42</sup> See, for example, Turner, 103 Am J Intl L at 119, 121–22 (cited in note 40).

<sup>43</sup> See Hannah Arendt, *Eichmann in Jerusalem* 5, 18 (Penguin Books 1994); Milner S. Ball, *The Promise of American Law* 56 (1981), cited in Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* 65 (1997).

<sup>44</sup> See Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 Leiden J Intl L 925, 929 (2008).

<sup>45</sup> Id at 930.

a dominant role in shaping international criminal proceedings. It is reasonable to believe that, just as they have influenced procedural and substantive elements of international criminal law, these political goals ought to influence interpretations of ethical duties. Legal ethics at international criminal courts should not simply copy domestic models grounded in different social and moral conventions. They should accurately reflect the broader normative commitments of the international criminal justice system.

It is not the burden of defense attorneys to assume responsibility for advancing these broader goals of international criminal law. But defense attorneys are crucial participants in the system, and the standards and guidelines that apply to their behavior must not fail entirely to recognize these important goals. As I discuss in Section IV, although international criminal defense attorneys do not believe that their behavior should generally be guided by the broader political objectives of international criminal law, they do appear to accept the limits that these purposes may impose on their conduct in many concrete situations.

## B. Influence of the Inquisitorial Tradition

The rules of procedure and evidence of international criminal courts were deliberately designed to reflect a mix of the adversarial and inquisitorial traditions. This hybrid procedural framework also calls for a fresh and distinct approach to legal ethics. Attorneys at international criminal courts must reconcile adversarial notions of zealous defense with the less aggressive practices associated with the inquisitorial system. Because most attorneys practicing before the international criminal courts come from inquisitorial systems, their behavior will often align with the inquisitorial approach and may further steer the development of international legal ethics in that direction. To understand the effect of this mix of legal traditions—and the unique confluence of procedure it produces for international criminal trials—it is useful to compare the main features of the adversarial and inquisitorial approaches, particularly as they relate to the ethics of criminal defense.

### 1. The Inquisitorial and Adversarial Approaches to Ethics in Criminal Defense

The inquisitorial and adversarial traditions assign different responsibilities to the participants in criminal trials. In the adversarial system, defense attorneys bear the burden of conducting investigations that may help the defendant. Although the prosecution must disclose exculpatory evidence in its possession, the defense cannot rely on the prosecution to gather such evidence in the first place. At trial, the parties, not the court, are in charge of presenting the evidence and examining witnesses. The judge is not expected to intervene to ensure that

all the relevant evidence is brought out, even if the judge observes that a defense attorney is failing in his task to do so. This distribution of responsibilities during investigation and trial has implications for the ethical duties of defense attorneys. Independent investigation of the facts and zealous advocacy at trial are expected of defense attorneys in adversarial systems, whereas such duties are not imposed on their counterparts in inquisitorial systems.

In inquisitorial systems, both the police and the prosecution have the duty to investigate exculpatory, as well as inculpatory, evidence.<sup>46</sup> This evidence is compiled in an investigative file, which is typically accessible to the defense and the judge before trial. Judges play an active role in the proceedings, examining the charges and requesting modifications if necessary, questioning witnesses, requesting further evidence-gathering as needed, and even raising issues on behalf of the defense. The role of defense attorneys is more limited. For example, the defense attorney is not expected to gather evidence on her own. Her primary duty is to interpret the evidence gathered by the state in a manner favorable to her client.<sup>47</sup> In some inquisitorial countries, the traditional role of defense attorney has been to present an oral argument, at which the attorney could “bring before the tribunal the human reality of his client, usually in the hope of securing a lenient sentence.”<sup>48</sup> As a result, in many cases, the attorney mainly works to persuade the client to show remorse and potential for rehabilitation and thus obtain a lower sentence—a strategy sometimes referred to as “*defense de connivence*” or “collusion defense.”<sup>49</sup>

It should be noted that many contemporary criminal justice systems that are still described as inquisitorial no longer neatly fit this model. Germany, Italy, and several Latin American and Eastern European countries have introduced

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<sup>46</sup> In practice, prosecutors and police frequently fail to actively investigate such evidence even in inquisitorial systems. See, for example, Heribert Ostendorf, *Strafvereitelung durch Strafverteidigung*, 28 Neue Juristische Wochenschrift 1345, 1348 (1978). For a similar observation with respect to French investigative judges, see Jacqueline Hodgson, *The Role of the Criminal Defence Lawyer in an Inquisitorial Procedure: Legal and Ethical Constraints*, 9 Legal Ethics 125, 135–36, 136 n 48 (2006).

<sup>47</sup> See, for example, Mirjan Damaška, *The Faces of Justice and State Authority* 178 (Yale 1986); Leonard L. Cavise, *The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 Wayne L Rev 785, 793 (2007); Hodgson, 9 Legal Ethics at 140, 143 (cited in note 46).

<sup>48</sup> John Leubsdorf, *Man in His Original Dignity: Legal Ethics in France* 83 (Ashgate 2001); see also André Dumont, *L'avocat au pénal, auxiliaire de la justice?*, 5 Déviance et société 55, 55, 56, 60 (1981) (arguing that the primary role of the defense attorney is to relate the defendant's personality to the judge).

<sup>49</sup> See Henri Ader and André Damien, *Règles de la Profession d'Avocat* §§ 31.52, 86.09 (11th ed 2006) (discussing “defense de rupture” and “defense de connivence”); see also Leubsdorf, *Man in His Original Dignity: Legal Ethics in France* at 83 (cited in note 48) (noting that the main goal of defense attorneys in France is to secure a lenient sentence for their clients and that judges in France often believe that the role of defense attorneys is not to defend, but to console their clients).

important adversarial features to their proceedings, such that it is more appropriate to call them “mixed” rather than inquisitorial systems.<sup>50</sup> Accordingly, the responsibilities of defense attorneys to investigate and present their clients’ cases proactively have increased. As the procedural framework has changed, interpretations of ethical norms have also shifted toward the adversarial model of partisan defense.<sup>51</sup> Defense attorneys have also become more assertive in their representation, leading some judges and scholars to lament the rise of “conflict defense” or “excessive defense.”<sup>52</sup>

Still, the adversarial system remains largely party-led, whereas even mixed systems leave most of the evidence-gathering to the police and prosecution and control over the presentation of the evidence to judges. Defense attorneys in adversarial systems are still more likely to feel personal responsibility for the success or failure of a case<sup>53</sup> and more likely to believe that aggressive advocacy is justified to advance the client’s case.<sup>54</sup>

More broadly, inquisitorial and mixed systems continue to place a greater emphasis on seeking the precise truth and creating an authoritative record of events.<sup>55</sup> Although all criminal justice systems view the pursuit of truth as a central goal, adversarial systems are typically more willing to suspend some truth-seeking efforts in order to ensure the preservation of individual liberties.<sup>56</sup>

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<sup>50</sup> John Jackson, *Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries*, in John Jackson, et al, eds, *Crime, Procedure and Evidence in a Comparative and International Context* 221, 224 (Hart 2008).

<sup>51</sup> See, for example, Ostendorf, 28 *Neue Juristische Wochenschrift* at 1348 (cited in note 46).

<sup>52</sup> Michael Bohlander, *A Silly Question? Court Sanctions Against Defence Counsel for Trial Misconduct*, *Crim L F* 467, 471 (1999); see also David Luban, *The Sources of Legal Ethics: A German-American Comparison of Lawyers’ Professional Duties*, 48 *RabelsZ* 245, 281, 283 (1984) (finding that German attorneys are more adversarial in their outlook than the formal rules of ethics and procedure might suggest). Even in France, which continues to be a more classic inquisitorial system, defense de rupture (conflict defense) appears to have become a viable alternative to the defense de connivence (collusion defense). Ader and Damien, *Règles de la Profession d’Avocat* at §§ 31.52, 86.09 (cited in note 49). But see Hodgson, 9 *Legal Ethics* at 143 (cited in note 46) (noting that despite some advances in defense rights in France, the defense attorney’s role is still primarily to complement the official inquiry by the state and to lend moral support to the accused).

<sup>53</sup> Geoffrey C. Hazard, Jr. and Angelo Dondi, *Legal Ethics: A Comparative Study* 68 (Stanford 2004).

<sup>54</sup> See David Luban, *Twenty Theses on the Adversarial System*, in Helen Stacy and Michael Lavarch, eds, *Beyond the Adversarial System* 134, 139–40 (Federation 1999) (discussing the link between the adversarial system and zealous advocacy).

<sup>55</sup> See, for example, Elisabetta Grande, *Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth*, in Jackson, et al, eds, *Crime, Procedure and Evidence in a Comparative and International Context* at 146–47 (cited in note 50); Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 *Harv J L & Pub Poly* 157, 167–73 (2003).

<sup>56</sup> Felicity Nagorcka, et al, *Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 *Melb U L Rev* 448, 462 (2005); Weigend, 26 *Harv J L & Pub Poly* at 167–73 (cited in note 55); see also Leubsdorf, *Man in His Original*

For example, adversarial systems are generally more likely to suppress illegally obtained evidence, to scrupulously honor a suspect's right to remain silent, and to give suspects broader access to counsel during interrogations. The greater emphasis that inquisitorial systems place on the discovery of the "objective" truth (even if at the expense of what might be viewed as important individual rights in adversarial systems) also helps to explain the more limited involvement of defense attorneys in the criminal process. From the perspective of inquisitorial systems, aggressive defense lawyers are more likely to place obstacles on the road to truth.<sup>57</sup>

Ultimately, while both systems value truth-seeking, they differ significantly in the procedural paths they take toward discovering the truth.<sup>58</sup> Whereas inquisitorial systems place greater confidence in the impartiality of judges, adversarial systems are more skeptical.<sup>59</sup> They assign investigative responsibilities to two opposing parties, rather than to court officials. They also structure the criminal process to err on the side of wrongful acquittals rather than wrongful convictions. Participants in the adversarial system are fond of the well-known maxim that it is better that ten guilty men should go free than that one innocent should suffer.<sup>60</sup> While inquisitorial systems certainly attempt to avoid convicting the innocent and also place a high burden of proof on the prosecution, the notion of a trade-off between wrongful acquittals and wrongful convictions is less pervasive.

The different relative weight that the two systems place on the search for truth and the rights of the accused has implications for ethical rules as well. Zealous advocacy is a central ethical principle for criminal defense attorneys in most adversarial systems. While the debate continues as to whether defense attorneys in adversarial systems are ethically bound to press for absolutely every advantage that may be legally available to the client, there is no question that they must pursue their client's cause with zeal and act as true partisans.<sup>61</sup> If they fail to do so—even if it is because they have moral problems with the tactics

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*Dignity: Legal Ethics in France* at 53 (cited in note 48) ("[T]he French tend to see trials as celebrations of order through the recognition of objective truth and law, rather than as celebrations of individual rights or discussions from which valid solutions will emerge . . .").

<sup>57</sup> Damaška, *The Faces of Justice and State Authority* at 177 (cited in note 47); Hodgson, 9 *Legal Ethics* at 129, 129 n 16, 144 (cited in note 46); Nagorcka, et al, 29 *Melb U L Rev* at 462 (cited in note 56).

<sup>58</sup> Grande, *Dances of Criminal Justice* at 146 (cited in note 55).

<sup>59</sup> Nagorcka, et al, 29 *Melb U L Rev* at 462 (cited in note 56).

<sup>60</sup> 4 William Blackstone, *Commentaries* \*358. For a history of the permutations of this saying, consider Alexander Volokh, *N Guilty Men*, 146 *U Pa L Rev* 173 (1997).

<sup>61</sup> See, for example, Murray Schwartz, *The Professionalism and Accountability of Lawyers*, 66 *Cal L Rev* 669, 672–73 (1978).



used or the ends pursued—they may be seen as failing to fulfill their duty.<sup>62</sup> Because the adversarial system expects that lawyers would not restrain their advocacy on moral grounds, it also does not hold them morally accountable “for [either] the ends pursued by the client [or] the means of pursuing those ends, provided that both means and ends are lawful.”<sup>63</sup>

The adversarial system also generally views the lawyer as the agent of the client and requires the lawyer to consult the client regularly on matters that may substantially affect the client’s interests.<sup>64</sup> Lawyers must follow the clients’ instructions on many significant decisions unless these instructions are unlawful.<sup>65</sup> This agency relationship between lawyer and client supports the notion that lawyers are not morally accountable for the means and ends of representation, provided they are acting within the letter of the law. It also arguably helps contribute to the greater partisanship of American criminal defense, as it strengthens lawyers’ commitment to advance the client’s goals by any legal means possible.

Inquisitorial systems generally take a more restrained view of advocacy. Their codes of conduct do not urge zealousness.<sup>66</sup> Instead, they emphasize virtues such as “dignity, conscience, independence, integrity, and humanity,” “delicacy, moderation, [and] courtesy,” and, with respect to clients, “competence, devotion, diligence, and prudence.”<sup>67</sup> Some inquisitorial systems not only do not require aggressive defense, but also tend to expect the defense to cooperate in the administration of justice and the revelation of the truth.<sup>68</sup>

<sup>62</sup> Luban, 48 *RabelsZ* at 253–54 (cited in note 52).

<sup>63</sup> Luban, *Twenty Theses on the Adversarial System* at 140 (cited in note 54).

<sup>64</sup> See, for example, Leubsdorf, *Man in His Original Dignity: Legal Ethics in France* at 18 (cited in note 48); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *Mich L Rev* 1469, 1477–78 (1966) (arguing that a lawyer may discuss moral issues with clients, but ordinarily must bow to the client’s will).

<sup>65</sup> MRPC R 1.2(a) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation . . . . In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”) (cited in note 1).

<sup>66</sup> Luban, 48 *RabelsZ* at 267 (cited in note 52).

<sup>67</sup> *Règlement Intérieur du Barreau de Paris*, Art 1.3 (2009), online at <http://www.avocatparis.org/ribp.html> (visited Nov 21, 2009); Leubsdorf, *Man in His Original Dignity: Legal Ethics in France* at 39 (cited in note 48); see also Luban, 48 *RabelsZ* at 267–68 (cited in note 52); Damaška, *The Faces of Justice and State Authority* at 177–78 (cited in note 47).

<sup>68</sup> See, for example, Hodgson, 9 *Legal Ethics* at 134–35, 141, 143 (cited in note 46); see also Art 30 of *Estatuto General de la Abogacia Espanola* (BOE 2001) (“The fundamental obligation of a Lawyer, as a part of the Public Administration, is to cooperate with the Ministry of Justice, advising, mediating and defending at Law the interests that are entrusted to him. The protection of these interests . . . cannot justify the diversion of the supreme aim of Justice.”), translated online at

For example, they still regard defendants as an important source of information and expect them to testify in the proceedings, despite a formal right to remain silent.<sup>69</sup> To encourage such testimony, inquisitorial systems allow defendants to give an unsworn statement and do not subject them to perjury charges for testifying falsely.<sup>70</sup> They also permit courts to draw adverse inferences from a failure to testify, and judges and attorneys make this plain to defendants, directly or indirectly.<sup>71</sup> Similarly, defense attorneys are not expected to challenge aggressively the official judicial inquiry into the facts of the case. They are not supposed to investigate independently, but to submit requests for investigation to the court.<sup>72</sup> They also cannot develop arguments that suggest a client's innocence if they know such arguments to be false.<sup>73</sup> And as a general rule, they cannot impeach a witness whom they know to be telling the truth.<sup>74</sup>

Lawyers' autonomy from clients is also greater in inquisitorial than in adversarial systems. Thus, French *avocats* have traditionally been seen as "absolutely free," "master[s] of [their] argument," and "sovereign judges of the means of defense" in deciding how to conduct a case.<sup>75</sup> German lawyers, too, generally hold the belief that the client must accept representation on their terms, rather than dictating his own to them.<sup>76</sup> Lawyers in these systems are seen as more capable than the client of determining the best interests of the client and have broad discretion to decide on the ends and means of representation. As a

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[http://www.ccbe.org/fileadmin/user\\_upload/NTCdocument/en\\_spain\\_bylawspdf1\\_1188889840.pdf](http://www.ccbe.org/fileadmin/user_upload/NTCdocument/en_spain_bylawspdf1_1188889840.pdf) (visited Nov 21, 2009); Code of Conduct Regulations [CCR] Arts 24(1), 24(l)(b) (Cyprus) ("Advocates must always have in mind that they serve justice and cooperate toward its administration."); Damaška, *The Faces of Justice and State Authority* at 174–76 (cited in note 47).

<sup>69</sup> Damaška, *The Faces of Justice and State Authority* at 165 (cited in note 47) ("[W]ell into the twentieth century, some Western European countries expressly provided that the criminal defendant had a duty to answer, and it is by no means clear that many systems presently in force do not still tacitly assume such a duty."); Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U Ill L Rev 791, 824–27 (2001).

<sup>70</sup> Damaška, *The Faces of Justice and State Authority* at 166, 168 (cited in note 47); Lerner, 2001 U Ill L Rev at 827 (cited in note 69).

<sup>71</sup> Lerner, 2001 U Ill L Rev at 825 (cited in note 69) (observing that through the tone of their questions, French judges suggest that they expect defendants to respond).

<sup>72</sup> Some commentators therefore describe them as auxiliaries to the judge, rather than as primary actors in the truth-seeking process. Hodgson, 9 Legal Ethics at 134 (cited in note 46).

<sup>73</sup> *Id.* at 141.

<sup>74</sup> See Section III.A.

<sup>75</sup> Leubsdorf, *Man in His Original Dignity: Legal Ethics in France* at 16 (cited in note 48).

<sup>76</sup> Luban, 48 *RabelsZ* at 266 (cited in note 52) (noting that the German system regards lawyers as advisors to, rather than mere representatives of, their clients).

result, they are less able to distance themselves from the social implications of what they do and say in support of their clients.<sup>77</sup>

## 2. The Influence of the Inquisitorial Tradition at International Criminal Courts

The differences between the inquisitorial and adversarial traditions play out regularly in international courtrooms. The procedural regimes of the ICTY, ICTR, and ICC incorporate elements of each tradition. Inquisitorial practices are becoming more prominent at the ICC and, increasingly, at the ICTY and ICTR as well.<sup>78</sup> The following is a brief sketch of some of the key inquisitorial features that influence the roles and the professional conduct of trial participants.<sup>79</sup>

As in inquisitorial systems, defense attorneys at the ICC can rely on the prosecution to gather at least some exculpatory evidence for them. ICC prosecutors have obligations regarding the collection and disclosure of evidence that are more significant than those of prosecutors in the American system. They must look for exonerating as well as incriminating evidence.<sup>80</sup> And while prosecutors need not turn over the entire investigative file to the court and the defense, as they would in pure inquisitorial systems, they do have extensive disclosure obligations early in the process. They must disclose potentially exculpatory evidence “as soon as practicable.”<sup>81</sup> ICC judges have interpreted this to mean that the prosecution has an ongoing obligation to disclose such evidence and that the obligation begins before the charges are confirmed.<sup>82</sup> Even

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<sup>77</sup> Nagorcka, et al, 29 Melb U L Rev at 466 (cited in note 56).

<sup>78</sup> See, for example, Kai Ambos, *International Criminal Procedure: “Adversarial,” “Inquisitorial,” or Mixed?*, 3 Intl Crim L Rev 1, 5–6 (2003).

<sup>79</sup> For a more thorough analysis, consider id; Claus Kress, *The Procedural Law of the International Criminal Law in Outline: Anatomy of a Unique Compromise*, 1 J Intl Crim Just 603 (2003) (describing the ICC); Alphons Orie, *Accusatorial v Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in Proceedings Before the ICC*, in Cassese, et al, eds, *The Rome Statute of the International Criminal Court: A Commentary* 1439 (cited in note 15).

<sup>80</sup> Rome Statute of the International Criminal Court (“ICC Statute”) (1998), Art 54 (1)(a), 37 ILM 999 (1998) (“The Prosecutor shall in order to establish the truth, extend the investigation to cover all facts and evidence . . . and . . . investigate incriminating and exonerating circumstances equally.”).

<sup>81</sup> Id, Art 67(2) (“In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused . . .”). By contrast, in the US, even some exculpatory evidence need not be disclosed “as soon as practicable.” *United States v Ruiz*, 536 US 622, 629 (2002) (holding that impeachment evidence, which is often key to the defense’s ability to uncover flaws in the government’s case, need not be disclosed prior to plea negotiations).

<sup>82</sup> *Prosecutor v Lubanga*, Case No ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Timetable, ¶¶ 125–29 (May 15, 2006); *Prosecutor v Katanga*, Case No

before the hearing to confirm the charges, prosecutors must also disclose evidence on which they will rely to argue that charges should be confirmed.<sup>83</sup> At the ICC, all disclosed evidence must also be communicated to the Pre-Trial Chamber (a three-judge panel that decides on pretrial matters),<sup>84</sup> making the process somewhat similar to the dossier system of inquisitorial countries, in which the court receives the entire investigative file before trial. The broader disclosure responsibilities of prosecutors help level the resource disparities between prosecution and defense and arguably reduce the need for aggressive defense.

The inquisitorial tradition has also influenced judicial responsibilities at international criminal courts. Judges have broad authority to manage the proceedings and the presentation of evidence.<sup>85</sup> Under Article 69(3) of the ICC Statute, the court has “the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”<sup>86</sup> The presiding judge “may give directions for the conduct of the proceedings,”<sup>87</sup> and only if she does not issue such directions do the prosecutor and the defense “agree on the order and manner in which the evidence shall be submitted.”<sup>88</sup> ICC judges therefore have broad discretion to determine how adversarial or inquisitorial the trial proceedings will be. Based on the experience with the first case before the court, it is likely that the proceedings will be a mix of the two models.<sup>89</sup> As in

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ICC-01/04-01/07-60, Decision Modifying the Calendar for the Disclosure of the Supporting Materials of the Prosecution Application for a Warrant of Arrest Against Germain Katanga, 8-9 (Nov 5, 2007). The ICC has enforced the prosecution’s disclosure duties quite strictly. It was prepared to terminate its first case and release a defendant from custody as a remedy for disclosure violations by the prosecution. See Heikelina Verrijn Stuart, *The ICC in Trouble*, 6 J Intl Crim Just 409, 409-10 (2008).

<sup>83</sup> International Criminal Court, Rules of Procedure and Evidence (“ICC RPE”), R 77, UN Doc ICC-ASP/1/3 (2002) (“The Prosecutor shall . . . permit the defence to inspect any books, documents, photographs and other tangible objects . . . which are . . . intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial . . .”).

<sup>84</sup> Id, R 121(2)(c).

<sup>85</sup> Ambos, 3 Intl Crim L Rev at 19 (cited in note 78) (“[Judges are] responsible for the conduct of proceedings, may require the production of evidence, and rule on any other relevant matters.”) (citations to ICC Statute omitted).

<sup>86</sup> ICC Statute, Art 69(3).

<sup>87</sup> Id, Art 64(8)(b).

<sup>88</sup> ICC RPE, R 140.

<sup>89</sup> In the first case before the ICC, the court recognized the parties’ agreements on the presentation of evidence and called for a two-case approach to the presentation of evidence, with the prosecution going first. The court’s decision also allowed for cross-examination (called “subsequent questioning”). Ruben Karemaker, et al, *Witness Proofing in International Criminal Tribunals: Response to Ambos*, 21 Leiden J Intl L 917, 918 n 7 (2008); see also *Prosecutor v Lubanga*, Case No ICC-01/04-01/06-1084, Decision on the Status Before the Trial Chamber of the

adversarial systems, the prosecution and defense will each be presenting affirmative cases, with opportunities for cross-examination by the opposing party. Ultimately, however, as in inquisitorial countries, the court will retain control over the conduct of proceedings—regularly questioning the witnesses, calling for further evidence, and summoning additional witnesses as necessary.<sup>90</sup> Because judges at international criminal courts have a duty to give a thorough reasoned judgment on the facts and the law, which is fully reviewable on appeal, they have a strong incentive to play an active role in examining the evidence at trial.<sup>91</sup> In the overall effort to determine the truth, judges may regularly intervene to bring out facts that the parties have neglected.

Another feature of international criminal procedure also confirms the judges' central responsibility as guardians of an accurate record. When the parties attempt to resolve a case consensually, judges are not bound by the parties' agreement about the charges, the facts, or the sentence. Instead, judges are expected to review carefully the validity of the defendant's admission of guilt, including its factual basis. If additional fact-finding is necessary or if the interests of justice so require, the court may call for further presentation of evidence or reject the admission of guilt altogether.<sup>92</sup> Even when the parties attempt to dispose consensually of certain charges before indictment, judges may be able to change the legal characterization of the facts to include new and more serious charges.<sup>93</sup> At the ICTY and ICTR, judges have already rejected several plea agreements and guilty pleas as unsupported by the facts or inconsistent with the interests of justice.<sup>94</sup>

The inquisitorial tradition has also left a mark on the ethical rules of international criminal courts, particularly the ICC. The Codes of Conduct for the ICTY and ICTR were heavily influenced by a detailed proposal of the American

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Evidence Heard by the Pre-Trial Chamber and the Decisions of the Pre-Trial Chamber in Trial Proceedings, and the Manner in Which Evidence Shall Be Submitted, ¶¶ 1–2, 4 (Dec 13, 2007). A perusal of the transcripts indicates, however, that judges were quite active in questioning witnesses.

<sup>90</sup> Tuinstra, *Defence Counsel in International Criminal Law* at 143 (cited in note 12). Over the last several years, the ICTY and ICTR have also moved from a more adversarial to a more inquisitorial model of judicial control over the proceedings. See, for example, *id.*; Ambos, 3 *Intl Crim L Rev* at 18–19 (cited in note 78); Kress, 1 *J Intl Crim Just* at 612 (cited in note 79).

<sup>91</sup> Kress, 1 *J Intl Crim Just* at 612 (cited in note 79).

<sup>92</sup> ICC Statute, Art 65(4).

<sup>93</sup> See, for example, *Prosecutor v Lubanga*, Case No ICC-01/04–01/06–2049, Decision Giving Notice to the Parties and Participants That the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ¶ 4 (July 14, 2009).

<sup>94</sup> Jenia Iontcheva Turner, *Plea Bargaining Across Borders* 234–35 (Aspen 2009). Such rejections are even more likely to occur at the ICC, given that its procedures are less hospitable to plea bargaining.

Bar Association and thus reflect primarily an adversarial influence. But like the procedural rules of these courts, ethical rules have over time been influenced by inquisitorial approaches.<sup>95</sup> The Code of Conduct for the ICC reflects inquisitorial influences even more clearly, because its drafters received input from a more diverse group of bar associations and non-governmental organizations.<sup>96</sup>

For example, the ICC Code of Conduct, echoing French ethical rules, requires attorneys to take a “solemn undertaking” that they will perform their duties with “integrity and diligence, honourably, freely, independently, expeditiously, and conscientiously.”<sup>97</sup> None of its provisions explicitly urges or requires lawyers to act zealously or aggressively in representing clients.

Other ethical guidelines, grounded in the ICC Rules of Procedure rather than the Code of Conduct, have also been interpreted in a manner more closely associated with inquisitorial systems. For example, two ICC Chambers have interpreted a gap in the rules of procedure to mean that the preparation of witnesses before testifying (“witness proofing”) is not a permissible practice at the ICC because it may interfere with the court’s truth-seeking function.<sup>98</sup> The practice is generally accepted in adversarial systems, but typically banned in inquisitorial systems.<sup>99</sup>

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<sup>95</sup> For example, the ICTY and ICTR have become more willing to impose counsel on accused, contrary to their earlier approach, which reflected the adversarial position and gave defendants broad rights to self-representation. They have also interpreted the client’s autonomy to make decisions about his representation more narrowly than adversarial jurisdictions. See, for example, *Prosecutor v Blagojević*, Case No IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, ¶¶ 104–07 (July 3, 2003). Finally, certain ICTR decisions have interpreted the duty of confidentiality along inquisitorial lines. Tuinstra, *Defence Counsel in International Criminal Law* at 210–12 (cited in note 12).

<sup>96</sup> Tuinstra, *Defence Counsel in International Criminal Law* at 197 (cited in note 12); Martha Walsh, *The International Bar Association Proposal for a Code of Professional Conduct for Counsel Before the ICC*, 1 J Intd Crim Just 490, 491, 496 (2003).

<sup>97</sup> ICC Code of Professional Conduct for Counsel (“ICC Code of Profl Conduct”), Art 5, UN Doc ICC-ASP/4/Res.1 (Dec 2, 2005).

<sup>98</sup> *Prosecutor v Lubanga*, Case No ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing, 9–22 (Nov 8, 2006); *Prosecutor v Lubanga*, Case No ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶¶ 28–29, 57 (Nov 30, 2007). For a stimulating debate on the merits of these decisions, compare generally, Ruben Karemaker, et al, *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence*, 21 Leiden J Intd L 683 (2008), with Kai Ambos, ‘Witness Proofing’ Before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman, 21 Leiden J Intd L 911 (2008).

<sup>99</sup> The practice is permitted and well-accepted in the US. See Peter A. Joy and Kevin C. McMunigal, *Witness Preparation: When Does It Cross the Line?*, 17 ABA Crim Just 48, 48 (2002). In Australia, lawyers are permitted to prepare, but not “coach” witnesses. Ysaiah Ross, *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* 559–60 §§ 15.1–15.2 (Butterworths 4th ed 2005). In

Another indication that defense attorneys appearing before the ICC will follow ethical guidelines that combine adversarial and inquisitorial elements is the Code of Conduct drafted by the International Criminal Bar (ICB). The ICB is an independent professional organization that represents defense attorneys practicing before the ICC. About half of the current attorneys assigned to cases before the ICC are also members of the ICB. The ICB developed a Code of Conduct and submitted it for consideration to the ICC during the drafting process of the ICC Code of Conduct. The ICB Code was therefore one of the sources influencing the deliberations of the drafters of the ICC Code. It reflects the views of a diverse group of international criminal defense attorneys, representing all five continents and all major legal systems.<sup>100</sup>

Like the final ICC Code, the ICB Code includes features that are arguably less adversarial and more inquisitorial. First, it does not mention a requirement of zealousness by attorneys, but instead emphasizes independence, honesty and integrity, and competence.<sup>101</sup> It does not adopt a posture of moral non-accountability for defense attorneys. Instead, in a provision referring to the attorney's role as counselor, the ICB Code notes that "[i]n rendering advice [to the client], counsel may refer not only to law but to other considerations such as moral, reputational, economic, social, and political factors that may be relevant to the client's situation."<sup>102</sup> The Code also adopts a less adversarial posture with respect to counsel's balancing of duties to the client and to the court. It provides that counsel "may refuse to offer evidence that counsel reasonably believes is false, irrelevant, or lacks probative value" and that counsel "shall not ask a question of a witness or make a statement of fact to the court without a good faith basis for the question or statement."<sup>103</sup> Although these provisions were ultimately not adopted by the ICC, they reflect the understanding of a

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England and Wales, solicitors are also permitted to prepare, but not coach witnesses; barristers are only allowed to familiarize witnesses with the courtroom and with the role of trial participants. *R v Momodu*, [2005] 2 All ER 571, ¶¶ 61–62; *Section 3: Written Standards for the Conduct of Professional Work*, Standard 6.3.1, in Bar Standards Board, *Code of Conduct of the Bar of England and Wales* (Bar Council of England and Wales 8th ed 2004) ("[I]t is wholly inappropriate for a barrister in . . . a [criminal] case to interview any potential witness. Interviewing includes discussing with any such witness the substance of his evidence or the evidence of other such witnesses . . ."); Anthony Thornton, *The Professional Responsibility and Ethics of the English Bar*, in Ross Cranston ed, *Legal Ethics and Professional Responsibility* 53, 85 (Clarendon 1995) (noting that an English solicitor may "interview all witnesses subject to rules prohibiting coaching").

<sup>100</sup> International Criminal Bar, Word of Welcome from the Presidents, online at <http://www.bpi-icb.org> (visited Nov 21, 2009).

<sup>101</sup> International Criminal Bar, Code of Conduct and Disciplinary Procedure, Arts 3-5 (2003).

<sup>102</sup> *Id.*, Art 28.

<sup>103</sup> *Id.*, Arts 49(2), 51(3).

substantial number of international criminal defense attorneys from different traditions and are therefore worthy of consideration.

Perhaps because it attempted to reconcile diverse ethical and legal traditions, the ICC Code of Conduct itself remains inconclusive or altogether silent on a number of important ethical questions, including client perjury, self-representation, division of authority between client and lawyer, and the impeachment of truthful witnesses. As discussed in Sections III and IV, the Code would benefit from a commentary that provides guidance on these questions in a way that accommodates both the inquisitorial and adversarial traditions, as well as the unique goals of international criminal law.

### C. Other Comparisons Between Domestic and International Criminal Defense

Across jurisdictions, legal ethics rules and commentaries tend to treat criminal defense as a special category that demands distinct regulation. Many scholars have argued that aggressive advocacy is more easily justified in the criminal than in the civil context.<sup>104</sup> At least in the US, legal ethics rules also reflect that position.<sup>105</sup>

Most arguments for aggressive advocacy in criminal cases focus on the potential abuse of power by the state and the concern to avoid an unjust conviction.<sup>106</sup> According to many proponents of this position, the greater the disparities of power and resources between the prosecution and the defense, the greater the need for zealous representation. Commentators have pointed to two other reasons for aggressive defense in the American context. One is that zealous representation in criminal cases must be encouraged, because the reality is far from this ideal. Many American criminal defense attorneys are so overworked that they struggle to provide even adequate representation, much less aggressive representation. Defendants become part of an “assembly line” in which their cases are processed with a fraction of the effort that the rules, case law, and textbooks envision. Instead of reminding attorneys of the limits to aggressiveness, the reasoning goes, the rules and guidelines should be pushing

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<sup>104</sup> See, for example, Luban, 91 Mich L Rev at 1730 (cited in note 1); Barbara Allen Babcock, *Defending the Guilty*, 32 Cleve St L Rev 175, 177–78 (1983–84). But see Simon, 91 Mich L Rev at 1703 (cited in note 1) (disagreeing with the prevailing view that criminal defense should be treated differently).

<sup>105</sup> For example, the Model Rules give criminal defense attorneys greater leeway to make meritless claims or contentions and to introduce evidence (specifically the defendant’s testimony) that they reasonably believe is false. MRPC R 3.1, 3.3 (cited in note 1).

<sup>106</sup> See, for example, Luban, 91 Mich L Rev at 1730 (cited in note 1) (“Power-holders are inevitably tempted to abuse the criminal justice system to persecute political opponents, and overzealous police will trample civil liberties in the name of crime prevention and order.”).



them to be more zealous.<sup>107</sup> A second argument is that particularly aggressive approaches to defense, even for guilty clients, are justified by the potential for unduly harsh punishments.<sup>108</sup>

I do not propose to address the merits of these arguments in the domestic system. Instead, this Section examines the extent to which these justifications apply at the international level.

### 1. “Assembly-Line” Representation

While the inadequacy of much defense representation has been a persistent theme for observers of the American criminal justice system, the same is not generally true at the international level. In the US, criminal defense attorneys rarely have the time and resources to conduct thorough investigations,<sup>109</sup> and some are not even able to discuss cases with their clients at any length.<sup>110</sup> Some commentators have described the situation as “assembly-line” representation.<sup>111</sup>

By contrast, at international courts, thorough investigation appears to be much more common. Defense attorneys represent no more than a few international clients at a time. They regularly discuss the case with their clients. Virtually all international defense teams conduct investigations on the territory where the crimes were committed.<sup>112</sup> The ICTY and ICTR provide the defense with financial support and personnel for this purpose. Some attorneys continue with their investigations even after exhausting the resources provided by the tribunals.<sup>113</sup> Defense attorneys also typically hire one or more expert witnesses in each of their cases.<sup>114</sup> They ordinarily conduct thorough cross-examinations of

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<sup>107</sup> Id at 1764.

<sup>108</sup> Babcock, 32 Cleve St L Rev at 178–79 (cited in note 104); Simon, 91 Mich L Rev at 1722–28 (cited in note 1).

<sup>109</sup> Data on New York City defense attorneys from the late 1980s showed that they hired experts in only 2 percent of felony cases (the rate rose to 17 percent in homicide cases) and interviewed witnesses in less than 5 percent of non-homicide felonies (the rate rose to roughly 20 percent in homicide cases). Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal L Rev 1585, 1602–03 (2005). A study of Phoenix attorneys found that only 55 percent of them visited the crime scene before a felony trial. Luban, 91 Mich L Rev at 1734–35 (cited in note 1).

<sup>110</sup> Luban, 91 Mich L Rev at 1734 (cited in note 1).

<sup>111</sup> Id at 1748.

<sup>112</sup> Turner, 48 Va J Intl L at 554 (cited in note 13) (reporting results from survey of forty-four defense attorneys at the ICTY and ICTR).

<sup>113</sup> Id at 555.

<sup>114</sup> The ICTY and ICTR provide the defense with financial support for at least one investigator and approximately 150 hours of expert pay per case. See John E. Ackerman, *Assignment of Defence Counsel at the ICTY*, in Richard May, et al, eds, *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* 167, 174 (Kluwer Law 2001) (observing that defense teams typically have

prosecution witnesses, even when they have little experience in this skill because of their inquisitorial background.<sup>115</sup> And courts are routinely subject to a barrage of motions filed by defense attorneys both before and during trial, even to the point of drawing criticism from irritated judges.<sup>116</sup>

In short, disengaged, “assembly-line” representation does not appear to be the problem at international tribunals that many believe it to be in domestic criminal justice systems.<sup>117</sup> Of course, the possibility always remains that individual defense attorneys will fail to pursue a given case with zeal and dedication. But from a systemic perspective, it is probably fair to say that international criminal defense attorneys are less in need of external encouragement to represent clients vigorously than the majority of their domestic counterparts.

## 2. Disproportionately Harsh Punishments

A second argument made by many lawyers and commentators in favor of aggressive tactics is that such methods are justified to protest the severe punishments that await many defendants in American criminal cases.<sup>118</sup> This motivates defense attorneys in the US in death-penalty cases, but also in cases

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one legal assistant and one investigator); Sylvia de Bertodano, *What Price Defence? Resourcing the Defence at the ICTY*, 2 J Intl Crim Just 503, 504 (2004) (observing that the ICTY now provides, as a matter of course, for up to three legal assistants and investigators); Michael G. Karnavas, *Gathering Evidence in International Criminal Trials—The View of the Defence Lawyer*, in Michael Bohlander, ed, *International Criminal Justice: A Critical Analysis of Institutions and Procedures* 75, 96 n 64 (Cameron May 2007) (commenting that expert pay is limited to 150 hours per case on average); Christian Rohde, *Legal Aid & Defence Counsel Matters*, in Rodney Dixon and Karim A.A. Khan, eds, *Archbold International Criminal Courts: Practice, Procedure and Evidence* 543, 592 (Sweet & Maxwell 2003) (noting that an individual expert’s working hours, not including court testimony, will typically be limited to between five and thirty hours); Rohde, *Legal Aid & Defence Counsel Matters* at 566 (noting that defense teams have hired a wide variety of experts, most notably military and medical experts).

<sup>115</sup> See Turner, 48 Va J Intl L at 568–70 (cited in note 13) (reporting that many ICTY and ICTR attorneys opt for aggressive cross-examination of witnesses). In the first trial before the ICC, defense attorneys coming from inquisitorial countries also performed well in cross-examining and impeaching prosecution witnesses. See Meribeth Deen, *Testimonial Inconsistencies Common in Criminal Trials* (Apr 2, 2009), online at <http://www.lubangatrial.org/2009/04/02/testimonial-inconsistencies-common-in-criminal-trials> (visited Nov 21, 2009).

<sup>116</sup> See Sonja B. Starr, *Ensuring Defense Counsel Competence at International Criminal Tribunals*, UCLA J Intl L & Foreign Aff \*1 n 6 (forthcoming 2009) (draft on file with author) (citing cases where irritated judges chastised counsel for filing frivolous motions).

<sup>117</sup> Some commentators have expressed concern about the lack of competence of international criminal defense attorneys, but this is a separate matter. Lack of competence is best addressed through better training and more discriminating admission procedures, rather than through rules urging more aggressive defense. See *id.* at Section II.A. Indeed, aggressive defense is likely to be even more harmful when practiced by incompetent attorneys.

<sup>118</sup> Babcock, 32 Cleve St L Rev at 178–79 (cited in note 104); Simon, 91 Mich L Rev at 1722–28 (cited in note 1).

involving harsh mandatory-minimum or “three-strikes” sentencing laws. At the international criminal level, this justification does not apply. Indeed, sentences at international criminal courts are more likely to be criticized for their leniency than for their undue severity.

International courts cannot impose the death penalty and are not bound by harsh mandatory minimums, sentencing guidelines, or recidivist enhancements. Some have called ICTY sentences imposed to date “inexplicably lenient” when compared to punishments meted out for violent offenses in domestic courts, as well as at the Nuremberg and Tokyo tribunals.<sup>119</sup> Even the ICTR, which has consistently imposed life imprisonment in genocide cases, has been criticized for being too forgiving relative to local Rwandan courts, which until recently regularly imposed the death penalty for genocide.<sup>120</sup> Over the last few years, sentences at the ICTR and ICTY have decreased even further as a result of the rise of plea bargaining.

The ICC also appears unlikely to be particularly punitive compared to other courts adjudicating cases of murder, rape, and other serious war crimes. Although it is supposed to adjudicate only cases of extreme gravity, its founding statute limits prison terms to thirty years, unless a life sentence is “justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”<sup>121</sup> Again, the death penalty is not available.

### 3. The Strength of the Prosecutorial Advantage

One of the most frequent arguments for permitting aggressive defense tactics in domestic trials is the perception that prosecutors enjoy significant advantages over defendants, both with respect to certain pre-trial procedures and with respect to financial and investigative resources. Closely related to these concerns is the ever-present potential for abuse of prosecutorial powers. While in some respects, the strength of the prosecution’s advantages might appear to be less pronounced in international courts, a more careful assessment indicates that the picture is mixed. Although it is probably true that international prosecutors usually hold less procedural leverage than prosecutors in American courts, the imbalance of resources appears to persist in both systems.

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<sup>119</sup> Mark B. Harmon and Fergal Gaynor, *The Sentencing Practice of International Criminal Tribunals: Ordinary Sentences for Extraordinary Crimes*, 5 J Intl Crim Just 683, 684–89 (2007); see also Steven Glickman, Note, *Victims’ Justice: Legitimizing the Sentencing Regime of the International Criminal Court*, 43 Colum J Transnatl L 229, 247–50 (2004) (discussing ICTY sentences and concluding that they have been too lenient to achieve the retributive goals of the tribunal).

<sup>120</sup> See Paul Roberts and Nesam McMillan, *For Criminology in International Criminal Justice*, 1 J Intl Crim Just 315, 332 (2003).

<sup>121</sup> ICC Statute, Art 77(1).

Professor Abe Goldstein wrote about the “balance of advantage” in American criminal procedure.<sup>122</sup> The prosecution must of course carry its burden to prove the case beyond a reasonable doubt, and it must do so based on admissible evidence. But in other respects, the prosecution enjoys significant procedural advantages over the defense. Among the features most commonly noted in the American context are the prosecution’s ability to overcharge and plea bargain to obtain concessions; the very limited discovery rights of criminal defendants; the government’s ability to search and seize the defendant’s property; and the use of immunity to obtain information from potential accomplices.<sup>123</sup> While many of these features also exist to a greater or lesser degree at the international level, the procedural playing field in international courts appears to tilt somewhat less strongly in the prosecution’s favor—in at least a couple of significant respects.

First, compared to their American counterparts, ICC prosecutors have narrower charging and bargaining discretion and less leverage over defendants in plea negotiations. An ICC prosecutor may freely amend or withdraw charges only up to the point of presenting the indictment to the Pre-Trial Chamber for confirmation. Because of the careful scrutiny of the charges by the Pre-Trial Chamber, prosecutors are limited in the extent to which they can “overcharge” a defendant to gain bargaining leverage. After the confirmation hearing, prosecutorial discretion to bargain about charges is also quite restricted, because the court must approve any amendments to the charges.<sup>124</sup> Prosecutors are constrained in their ability to bargain about sentencing as well. International judges are not bound by any plea agreements between the parties, and at least at the ICTY and ICTR, they have rejected several agreements as inconsistent with the interests of justice. At the ICC, plea agreements may face even more resistance. Even if a defendant admits guilt, ICC judges may call for further investigation in the case if they believe that further fact-finding is necessary to help them decide whether to accept an admission of guilt or a plea agreement.<sup>125</sup>

Second, international prosecutors are generally less well equipped than their domestic counterparts to gather evidence. They must rely on the cooperation of state authorities, who are frequently unwilling or unable to

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<sup>122</sup> Abraham Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L J 1149, 1149–50 (1960).

<sup>123</sup> Luban, 91 Mich L Rev at 1736–40 (cited in note 1).

<sup>124</sup> After the confirmation hearing and before trial, the prosecutor can amend charges only with permission of the Pre-Trial Chamber. Once the trial begins, the prosecutor may no longer amend the charges, but may withdraw them only with the consent of the Trial Chamber. ICC Statute, Art 61(9).

<sup>125</sup> *Id.*, Art 65.

provide it. Sometimes states are positively hostile to the efforts of international prosecutors and their investigators.<sup>126</sup> Even when prosecutors do have access to the evidence, they are under a mandate to gather both incriminating and exonerating evidence—which is not so in the American system.<sup>127</sup> ICC prosecutors must also disclose both incriminating and exonerating evidence to the defense before trial, most of it at the time the indictment is confirmed.<sup>128</sup> These stringent disclosure obligations further reduce the power disparities between the prosecution and the defense.

At the same time, the imbalance of financial and investigative resources between prosecution and defense appears to exist in international courts much as it does in domestic courts. International prosecutors ordinarily have significant financial advantages over international defense attorneys. The overall budget allotted to the defense at international courts is only about one-third of that allotted to the prosecution.<sup>129</sup> This budget is for defense attorneys appointed to represent indigent defendants. So far, the vast majority of international defendants have qualified for such support.<sup>130</sup> Still, as a result of

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<sup>126</sup> Sudan, for example, has detained and prosecuted persons suspected of cooperating with ICC prosecutors. International Federation for Human Rights, *Serious Concerns About Harassment Faced by Persons Suspected of Supporting or Cooperating with the International Criminal Court in Sudan* (Feb 2, 2009), online at <http://www.unhcr.org/refworld/docid/49885789c.html> (visited Nov 21, 2009). For a long time, officials in the former Yugoslavia also tried to obstruct the work of ICTY prosecutors. Consider Carla del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* 53, 56-57 (Other 2008). Because the ICC is supposed to take cases only when local authorities are unwilling or unable to investigate or prosecute, this can be expected to be a continuing problem.

<sup>127</sup> We have yet to see how scrupulously ICC prosecutors will fulfill this mandate. In domestic inquisitorial systems, the duty to gather exculpatory evidence has not always been followed rigorously in practice. See note 46 and accompanying text.

<sup>128</sup> ICC judges have already used their powers to rein in prosecutors when the latter were attempting to evade their disclosure obligations. *Prosecutor v Lubanga*, Case No ICC-01/04-01/06, Decision on the Release of Thomas Lubanga Dyilo, ¶ 1 (July 2, 2008).

<sup>129</sup> David Wippman, *The Costs of International Prosecution*, 100 Am J Intl L 861, 872 (2006) (discussing the ICTY budget). In some American jurisdictions, for example, the disparity is reportedly closer to one-eighth. Mary Sue Backus and Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 Hastings LJ 1031, 1045 n 60 (2006). But see ABA Standing Committee on Legal Aid & Indigent Justice, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 13-14, online at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise> (visited Nov 21, 2009) (noting that at the federal level, the disparity is closer to the one-third allotted to the defense in international courts: the prosecution receives twice the funding that the defense does, but this does not include "the amounts that are spent by police, forensic labs, and so forth that are not directly part of the prosecutor's office").

<sup>130</sup> Tuinstra, *Defence Counsel in International Criminal Law* at 30, 30 n 161 (cited in note 12).

the funding disparities, prosecutorial teams are generally better staffed and better supported than defense teams during both the investigation and trial.<sup>131</sup>

International prosecutors also enjoy important investigative advantages over the defense. Even more than their domestic counterparts, international criminal defense attorneys encounter great obstacles in procuring evidence and witnesses.<sup>132</sup> They must rely on state authorities for cooperation, and such cooperation is rarely forthcoming.<sup>133</sup> When defense attorneys turn to international courts for support, those courts are often unable to assist them in securing state cooperation.<sup>134</sup> Again, international prosecutors are also relatively weak in their investigative capacities compared to their domestic counterparts.<sup>135</sup> But in most cases, they will be able to rely on the backing of the international community and international criminal courts in their investigations. Such support is unlikely to be given to defense attorneys.

It may be, therefore, that the prosecution's relative advantages in international and domestic courts do not argue strongly for a difference in the ethical guidelines applicable to defense attorneys working in the two systems. But the other factors discussed above—the broader goals served by international criminal courts, the inquisitorial features of these courts, the relative absence of a need to exhort international attorneys to practice more aggressively, and the relatively milder sentences imposed by international tribunals—do weigh in favor of a different approach to the ethical practices of defense attorneys. In the following Section, I address four areas in which I believe these features of international criminal defense call for a distinct approach to ethics, and one that

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<sup>131</sup> The typical ICTY prosecution trial team consists of three attorneys, one legal officer, and five support staffers. Wippman, 100 Am J Intl L at 870 (cited in note 129). In addition, the prosecution can rely on the services of a corps of investigators working for the international tribunals. By contrast, the defense team typically consists of two attorneys and up to three legal assistants and investigators. Id at 871. A certain balance of advantages in favor of the prosecution, of course, can be justified by the fact that the prosecution bears a high burden of proof. At the ICC, the prosecution also has the obligation to investigate exculpatory, as well as inculpatory evidence.

<sup>132</sup> See, for example, Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 Yale J Intl L 111, 131 (2002); Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 Colum J Transnatl L 635, 676–80 (2006).

<sup>133</sup> As one international defense attorney commented, “[w]hen entering a State that is the subject-matter of a trial, the defence lawyer will be regarded as being on the side of an enemy and will be at risk of obstruction, threats, and physical abuse . . . . The defence lawyer does not have the international accreditation of the Prosecutor . . . .” Steven Kay, QC and Bert Swart, *The Role of the Defence*, in Cassese, et al, 2 *Rome Statute of the International Criminal Court: A Commentary* at 1424 (cited in note 15).

<sup>134</sup> See Cogan, 27 Yale J Intl L at 131 (cited in note 132); Gordon, 45 Colum J Transnatl L at 676–80 (cited in note 132).

<sup>135</sup> See note 126 and accompanying text.

would be best implemented by a commentary to existing Code of Conduct provisions.

### III. FOUR ETHICAL DILEMMAS FOR INTERNATIONAL CRIMINAL DEFENSE ATTORNEYS

Criminal defense attorneys encounter a host of situations in which their duty to clients appears to be pitted against their duties to the court and to the legal system. In the international context, serving the client aggressively—“doing anything arguably legal to advance the client’s ends”<sup>136</sup>—may at times interfere with important goals of international criminal trials, such as truth-seeking and restoring victims’ dignity. At the same time, privileging objectives other than zealous representation may seem to many defense attorneys to be inconsistent with the attorney’s duties to the client and, in some cases, with the client’s procedural rights. This Section reviews four ethical dilemmas that present competing ethical obligations and offers tentative conclusions about the ethical standards that should apply in light of the unique features and goals of international criminal trials.

#### A. Impeaching Truthful Witnesses

Imagine the following two scenarios. The first is a hypothetical discussed frequently in domestic legal ethics commentaries, and the second is more specifically targeted to international criminal proceedings:

1. The client has confided to his lawyer that he was present at a certain place at a certain time, and a prosecution witness has just stated that she saw the witness at that same place at the relevant time. However, the witness is an older woman who wears glasses, and the lawyer might try to impeach her on the ground that she has poor vision.<sup>137</sup> Should the lawyer do so, even though he knows that the witness is telling the truth?
2. Witness A is testifying that he was forcibly abducted to fight for the defendant’s rebel group when he was a child.<sup>138</sup> The defendant’s lawyer knows from talking with his client that the witness is telling the truth. Should the attorney cross-examine the witness so as to suggest to the court that the witness in fact joined the rebel group voluntarily?

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<sup>136</sup> Simon, 91 Mich L Rev at 1703 (cited in note 1).

<sup>137</sup> Id at 1706.

<sup>138</sup> Under Article 8(2)(b)(xxvi) of the ICC Statute, it is a crime to conscript or enlist children under 15 years and use them to participate actively in the hostilities. ICC Statute, Art 8(2)(b)(xxvi).

The stricter view of zealous advocacy suggests that a lawyer should impeach the witnesses in the above scenarios if the lawyer believes it would help the client's case. But such impeachment arguably interferes with the court's pursuit of truth and, in the second scenario above, may also unduly embarrass or burden the victim-witness. The question is how international courts should approach this potential ethical conflict.

The ICC Code of Conduct, like many domestic legal ethics rules, emphasizes the lawyer's duty not to mislead the court.<sup>139</sup> Article 24(3) of the ICC Code of Conduct provides that counsel "shall not deceive or knowingly mislead the Court." Article 25(1) further requires that counsel "at all times maintain the integrity of evidence, whether in written, oral or any other form, which is submitted to the Court. He or she shall not introduce evidence which he or she knows to be incorrect." The ICB's proposed Code of Conduct seemed to go even further, stating that "[c]ounsel shall not ask a question of a witness or make a statement of fact to the court without a good faith basis for the question or statement."<sup>140</sup>

Still, none of these provisions appears to squarely address the question of whether a defense attorney may attempt to cast doubt on testimony that the attorney knows to be truthful. A very broad reading of the ICC provisions might be construed as prohibiting the practice, under the theory that impeachment of truthful witnesses amounts to misleading the court. But this interpretation would seem unlikely. There is a difference between affirmative presentation of evidence that an attorney knows to be false and questioning of testimony that is presented by another (even if the lawyer knows the testimony to be truthful). The ICB's proposed provision would have come closer to addressing the issue directly. But even it does not explain what it means by the statement that counsel must have a good-faith basis for asking a question. Even if a defense lawyer knows that a witness is truthful, the lawyer could still argue that she has a good-faith basis for asking a question because of her duty to test the prosecution's evidence. Moreover, the ICB's proposed provision was not adopted by the court.

Adversarial procedural systems generally allow counsel to impeach truthful witnesses. In the US, for example, the ABA Standards for Criminal Justice state that "[d]efense counsel's belief or knowledge that the witness is telling the truth

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<sup>139</sup> French and German lawyers also may not knowingly mislead the court. See, for example, Ader and Damien, *Règles de la Profession d'Avocat* at §§ 31.41, 33.41 (cited in note 49). But neither French nor German ethics rules specifically address the question of impeaching truthful witnesses, and this question has given rise to a vigorous debate in the German literature.

<sup>140</sup> International Criminal Bar, Code of Conduct and Disciplinary Procedure, Art 51(3) (2003).



does not preclude cross-examination.”<sup>141</sup> Courts have also held that “[v]igorous advocacy by defense counsel may properly entail impeaching or confusing a witness, even if counsel thinks the witness is truthful.”<sup>142</sup> In adversarial systems, the defense’s primary role is to test the prosecution’s case. From an ethical perspective, therefore, it does not matter whether counsel believes or knows that an adverse witness is telling the truth. The court or the jury is charged with finding the truth, and counsel would be usurping this fact-finding role if he or she fails to challenge testimony that the jury might reasonably doubt.<sup>143</sup> Moreover, it is always possible (at least in theory) that the attorney’s own information is inaccurate and that the client is confused, has forgotten, or is falsely admitting guilt—for example, because he wants to protect a third party from responsibility.

More fundamentally, adversarial systems view vigorous cross-examination as the best guarantee that innocent persons will not be convicted and the truth will ultimately emerge. It is up to the prosecution to try to repair the witness’s credibility if the witness is confused by rigorous cross-examination. And it is

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<sup>141</sup> American Bar Association, *ABA Standards for Criminal Justice: Prosecution and Defense Function* §§ 4-7.6(b) (1993). It should be noted, however, that counsel would not be disciplined for failing to impeach a truthful adverse witness. As the Commentary to the ABA Standards states, “the mere fact that defense counsel can, by use of impeachment, impair or destroy the credibility of an adverse witness does not impose on counsel a duty to do so.” Id., § 4-7.6(b) cmt. Similarly, “[i]f defense counsel can provide an effective defense for the accused and also avoid confusion or embarrassment of the witness, counsel should seek to do so.” Id. Although the Model Rules generally ban tactics that “have no substantial purpose other than to embarrass, delay, or burden a third person,” these limitations have not been interpreted to prevent the impeachment of truthful witnesses. MRPC R 4.4(a) (cited in note 1); Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* 50 (Princeton 2008).

<sup>142</sup> *United States v Thoreen*, 653 F.2d 1332, 1338–39 (9th Cir 1981); Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* at 50 n \* (cited in note 141). Australian authorities have also noted that “[t]here appears to be a good argument that the defence counsel in a criminal case may cross-examine a witness he or she knows is telling the truth in order to discredit that witness before the jury. It seems to be fair tactics . . . for counsel to test the prosecution’s evidence and have the prosecution prove its case. The defence counsel should be allowed to search for weaknesses in the witness’s character or testimony, even though it has no relationship to accuracy.” Ross, *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* at 555–56 § 14.1113 (cited in note 99). But there are limits on such cross-examination in Australia and in the UK. Barristers may not suggest criminality, fraud, or other serious misconduct unless they have a reasonable basis for their suggestions. Id. at 556 § 14.114.

<sup>143</sup> See, for example, Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* at 50 (cited in note 141) (“The lawyer who holds back [in impeaching a witness whom the lawyer believes is testifying truthfully] abandons her advocate’s role and usurps the factfinder by denying it an independent opportunity to weigh credibility.”); Blake and Ashworth, 7 *Legal Ethics* at 184 (cited in note 1) (“[F]acts are for the court to find, not for the lawyer to pre-empt.”); Turner, 48 *Va J Int L* at 569–70 (cited in note 13) (quoting international criminal defense attorneys who hold this belief).

ultimately the court's duty to decide if the witness is credible. It would be inappropriate for the attorney to preempt that decision.

Inquisitorial systems tend to approach this question differently. As discussed earlier, they neither call for zealous advocacy by defense counsel nor authorize the impeachment of truthful witnesses. Many German commentators believe that an attorney's duty to the truth precludes such impeachment.<sup>144</sup> Some authorities link this duty to the lawyers' broader role as organs of the administration of justice,<sup>145</sup> which in the case of impeachment of truthful witnesses is said to trump the lawyers' duty of loyalty to their clients.

As a practical matter, the question of impeaching truthful witnesses does not arise as frequently in inquisitorial settings.<sup>146</sup> Witnesses are called by the court, and the court takes an active role in their examination. The opportunities for cross-examination by the parties are generally more limited. More broadly, this reflects the inquisitorial view that the best way to elicit truthful responses is not through partisan examination, but through dispassionate inquiry by an impartial judge.

The inquisitorial approach to impeachment of truthful witnesses is a relevant reference point for international criminal courts. At the ICC, judges also take an active role in questioning witnesses, who are viewed as witnesses of the court, rather than of the parties.<sup>147</sup> While the parties still take the primary role in examining witnesses, relative to adversarial proceedings, the proceedings at the

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<sup>144</sup> Compare Luban, 48 *RabelsZ* at 267 (cited in note 62) (noting that in Germany, a lawyer "may not contradict his opponent's statements if he knows them to be true, even in order to help his client to a just victory"); Gerd Pfeiffer, *Zulässiges und Unzulässiges Verteidigerhandeln*, 9 *Deutsche Richterzeitung* 341, 346 (1984); Wilhelm Krekeler, *Strafrechtliche Grenzen der Verteidigung*, 4 *Neue Zeitschrift für Strafrecht* 146, 152 (1989) with Anabel Harting, *Berufspflichten des Strafverteidigers und Sanktionierung Pflichtwidrigen Verhaltens* 156 (Deutscher Anwaltverlag 2008). See also Hans Dahn, *Handbuch des Strafverteidigers* 53–54 Rn 75 (Otto Schmidt 7th ed 2005) (noting that when an attorney knows that the witness is telling the truth on a particular point, the attorney should not attempt to impeach the credibility of the witness; but adding that impeachment is allowed if the witness is not telling the truth on a certain point, even if the lawyer knows that the gist of the overall testimony—pointing to the defendant's guilt—is accurate).

<sup>145</sup> This role is enshrined in Codes of Conduct, but because the Codes fail to specify the precise consequences following from it, courts and scholars have stepped in to give it more definition. See, for example, Werner Beulke, *Der Verteidiger im Strafverfahren* 200–01 (Metzner 1980) (noting the tension between the lawyer's role as *Organ der Rechtspflege* and her duty to the client, and advancing a theory that aims to accommodate both of these duties); Joachim Kretschmer, *Der Strafrechtliche Parteiverrat* 76 (Nomos 2005) (citing to court decisions making the connection between the duty as *Organ der Rechtspflege* and the duty to the truth). Other German commentators have linked the duty to the truth in different principles of criminal procedure, such as the principle of fair trial. See, for example, Wilfried Bottke, *Wahrheitspflicht des Verteidigers*, 96 *Zeitschrift für die Gesamte Strafrechtswissenschaft* 726, 752–53 (1984).

<sup>146</sup> See Hazard and Dondi, *Legal Ethics: A Comparative Study* at 67 (cited in note 53).

<sup>147</sup> Ambos, 3 *Int'l Crim L Rev* at 19–20 (cited in note 78).

ICC are expected to be less partisan and more oriented toward the court's neutral inquiry. Attempts by the defense to discredit truthful witnesses are likely to be seen as less appropriate in this setting. Moreover, as mentioned earlier, the ethical rules of the ICC do not require zealous advocacy, but simply diligence, integrity, and conscientiousness.<sup>148</sup> Accordingly, lawyers do not appear to have an independent duty to press for every advantage of their client, particularly when doing so may interfere with the court's pursuit of the truth.

Nor do the distinctive goals of international criminal law particularly support aggressive cross-examination of witnesses whom a lawyer believes to be truthful. On the one hand, the goal of providing a fair trial—and related procedural rights such as the presumption of innocence, proof beyond a reasonable doubt, and the right to confront witnesses—can be interpreted to demand nothing less than the aggressive examination of all witnesses for the prosecution, even those that a defense attorney knows to be telling the truth, provided the attorney believes the tactic will be effective.<sup>149</sup>

But this must be weighed against other goals. Creation of an accurate historical record, for example, would tend to disfavor impeachment of witnesses. Such impeachment risks muddling the record, opening doors for revisionist accounts, and preventing future generations from ever coming to know the true facts of the crimes committed.

In addition, when the impeached witness is also a victim of a violent crime or a relative of a victim, the attempt to discredit his or her testimony would interfere with the goal of providing victims with a sense of closure following great trauma or loss. Pointed challenges to the victims' accounts of the crime can "exacerbate their loneliness, alienation, confusion about what happened, and sense that they might be responsible for the horrors that befell them."<sup>150</sup> Instead of achieving closure, it is possible that victim witnesses may be forced to deal with additional anxiety resulting from attempts to undermine their credibility.<sup>151</sup> If victims who have suffered unspeakable horrors—even those whom the

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<sup>148</sup> ICC Code of Prof'l Conduct, Art 5.

<sup>149</sup> See, for example, Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* at 555-56 § 14.113 (cited in note 99) (noting that such tactics may be necessary to implement the attorney's duty to test the prosecution's evidence and hold the prosecution to its burden of proof).

<sup>150</sup> Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 Harv Int'l L J 295, 334 (2005) (citations omitted).

<sup>151</sup> See, for example, Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* 10, 57, 67, 129-30 (U Penn 2005); International Federation for Human Rights, *Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda* 8, 14-15 (2002), online at <http://www.iccnw.org/documents/FIDHrwVictimsBalanceNov2003.pdf> (visited Nov 21, 2009); Binaifer Nowrojee, "Your Justice Is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?, UN Research Inst for Soc Dev Occasional Paper 4, 10, 23 (2005).

defense knows to be testifying truthfully—are to be subjected routinely to unwarranted attacks on their own credibility, it would not be surprising to see calls for a movement to more purely inquisitorial trials where judges do the questioning.

Returning to the scenario presented at the outset of this Section, if ethical rules were interpreted solely in light of the legalist adversarial model, the attorney would certainly be allowed to cross-examine witness A so as to make it appear that he joined the rebel group voluntarily. If the attorney believes that the tactic would be effective, then under the stricter view of aggressive advocacy, the attorney would be ethically bound to pursue this course.

But the tactic would come at considerable cost with respect to other objectives of international trials. If the attorney actually manages to confuse witness A on the stand and undermine his testimony that he was abducted by the rebel group, this might prevent the court—as well as the public and possibly history—from learning the full truth about the particular crimes committed. Observers of the trial could be left with the inaccurate impression that children, such as the witness, joined the defendant's rebel group voluntarily. This type of impression would dilute the moral condemnation of the rebel group's use of child soldiers and conflict with the court's mission to promote respect for human rights, such as the right of children not to be enlisted to participate in hostilities. Finally, the witness could be further traumatized by the experience of testifying and having his honesty challenged.<sup>152</sup>

Although the rules are silent as to counsel's duties regarding the impeachment of truthful witnesses, both the inquisitorial orientation of the ICC procedural regime and several of the key goals of international criminal law suggest that counsel should be guided to refrain from this practice. The ICC ought to provide clearer guidance to lawyers for a more practical reason, too—to avoid inconsistent approaches to ethical questions before it. The guidance should be consistent with the goals of international criminal law and, where possible, should attempt to accommodate diverging domestic practices. A good way to implement this approach would be to include a commentary that helps lawyers interpret the ICC Code of Conduct. This would be easier than amending the Code, and it is a common practice in national jurisdictions. It would have the

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<sup>152</sup> The ICC Code of Conduct appears to reflect this special goal of international criminal law when it prohibits counsel from subjecting witnesses to “disproportionate or unnecessary pressure within or outside the courtroom.” ICC Code of Prof'l Conduct, Art 29(1). The Code also exhorts attorneys to have special consideration for “victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled.” *Id.*, Art 29(2). If a defense lawyer believes that a witness is telling the truth, attempting to discredit the witness's testimony may be considered a disproportionate tactic under the ICC Code, although this may be an overly expansive interpretation of the Rules.

benefit of giving lawyers some flexibility in their behavior, in recognition of the diverse approaches used in different domestic jurisdictions, while steering them toward conduct consistent with the overall goals of the international criminal justice system.

It is surely the case that many international defense attorneys already routinely decline to attempt impeachment of victim witnesses whom they know to be telling the truth. Even setting aside the attorney's personal view of the tactic, the attorney must consider how it will look to the judges. The odds that the strategy will backfire and that the attorney will lose credibility and moral standing in the eyes of the court (potentially harming the client's case) are substantial. Yet attorneys who interpret their ethical obligations as requiring the most aggressive tactics permitted under the law—and who cannot be certain that such tactics would be ineffective in a particular case—may feel duty-bound to pursue them. A clear indication from the court that impeachment of truthful witnesses, while not absolutely prohibited, is neither required nor encouraged, would help to address this concern.

When discussing the lawyer's duties to the court under Article 24(3) of the ICC Code of Conduct and duties to witnesses under Article 29(1), the commentary should specifically address obligations with respect to the impeachment of truthful witnesses. It could include an explanation along the following lines:

The lawyer's duty to his or her client does not require a lawyer to impeach the credibility of a witness on a particular point of evidence, particularly when the lawyer knows that the witness is testifying truthfully on that point. The Court urges lawyers not to attempt to impeach a testifying victim on a particular point of evidence when the lawyer knows that the witness is telling the truth on that point.

The commentary would thus clarify the conduct that appears most consistent with the goals of international criminal law. It would not impose an absolute prohibition on the impeachment of truthful witnesses, or create sanctions for noncompliant behavior, in recognition of the differing practices of adversarial systems. But it would promote an ethical standard that is more consistent with the structure and purposes of international courts than the aggressive adversarial standard that a number of international criminal defense attorneys currently employ.<sup>153</sup>

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<sup>153</sup> In a survey of ICTY and ICTR defense attorneys which I conducted in 2006 and 2007, about half of the respondents stated they would opt for impeaching truthful witnesses. Attorneys from adversarial systems were more likely to do so than attorneys from inquisitorial systems. See note 251 and accompanying text.

## B. Responding to Potential Client Perjury

Another question that presents a potential ethical dilemma for international criminal defense attorneys concerns the attorneys' response to a client's decision to testify falsely. Consider the following scenario: At the first meeting between a defense attorney and his client, the client tells the attorney that he has an alibi for the time of the crime—he was at a party in another part of town. After the lawyer investigates the alibi and finds no one to corroborate it, the client changes his story and says that, in fact, he stayed late at work that day. The lawyer follows up on this information, but again finds no corroborating evidence. The defendant then states that he was at home during the time of the crime and that his wife would support his testimony. He tells the attorney he intends to testify to this effect at trial. When the lawyer asks the client whether the alibi is true, the client refuses to answer directly, but simply says: "My wife will back it up."

Set aside, for the moment, strategic considerations as to whether such testimony would in fact be useful. Is the defense attorney ethically compelled to counsel his client not to give testimony that the attorney knows (or is virtually certain) is false? Should he threaten to withdraw if the client insists on testifying? The situation presents a tension between the lawyer's duty of candor to the court and his duties of loyalty and confidentiality to the client. It also implicates the defendant's right to testify on his own behalf.

Ethical rules at the ICC do not explicitly impose a duty on defense attorneys to prevent their clients from testifying falsely. As noted earlier, Article 24(2) of the ICC Code of Conduct provides that "[c]ounsel is personally responsible for the conduct and presentation of the client's case and shall exercise personal judgement on the substance and purpose of statements made and questions asked." But this provision is broadly worded and offers no concrete guidance on the question of client perjury.<sup>154</sup> Article 24(3) provides that *counsel* "shall not deceive or knowingly mislead the Court," but this also does not explain how counsel should respond to a decision by the *client* to present false testimony.<sup>155</sup> Does the Article imply that a lawyer does not present or permit testimony that the lawyer does not find credible? The rule is silent on this point. The proposed ICB Code of Conduct provided, more concretely, that "[c]ounsel may refuse to offer evidence that counsel reasonably believes is false, irrelevant, or lacks probative value."<sup>156</sup> But again, this provision was not adopted as part of the ICC Code.

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<sup>154</sup> See Human Rights First, *Ensuring Ethical Representation* vi (Nov 2004), online at <http://www.iccnw.org/documents/icc-ethics-report-120304.pdf> (visited Nov 21, 2009).

<sup>155</sup> *Id.*

<sup>156</sup> International Criminal Bar, Code of Conduct and Disciplinary Procedure, Art 49(2) (2003).

The presumption of innocence and the requirement of proof beyond a reasonable doubt would suggest that an attorney who merely believes, but does not know, that the client would testify falsely has no obligation to intervene. If the attorney merely suspects that the client's testimony would be untruthful, he or she should generally resolve doubts and suspicions in favor of the client. This is the position of the US Model Rules and of other adversarial system authorities.<sup>157</sup> At the same time, as the comments to the Model Rules affirm, the lawyer "cannot ignore an obvious falsehood."<sup>158</sup> Once the lawyer has a "firm factual basis" or is "convinced beyond a reasonable doubt" that a client will testify falsely,<sup>159</sup> as an officer of the court, the lawyer must take action to prevent the untruthful testimony or at least disassociate himself from it.<sup>160</sup>

A few American state courts have been more solicitous of the defendant's interest in testifying in his own defense. They have held that due process and the right to counsel require an attorney to present his client as a witness, even when counsel *knows* that the testimony will be false.<sup>161</sup> They consider the defendant's ability to testify to be a critical element of his ability to present a meaningful defense.<sup>162</sup> Therefore, even if a lawyer believes that a client intends to testify falsely, the lawyer should not prevent the client from exercising the right to testify. According to this minority position, the lawyer is not supposed to be the judge of the client's credibility in any circumstance whatsoever—this is for the

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<sup>157</sup> See, for example, *R v Moore*, [2002] 217 Sask R 259, ¶¶ 48–54 (discussing the rules in Canada); Blake and Ashworth, 7 Legal Ethics at 174–76 (cited in note 1) (discussing the rules in England and Wales).

<sup>158</sup> MRPC R 3.3 cmt 8 (cited in note 1).

<sup>159</sup> See Annotated MRPC R 3.3, Annotation: Knowledge 317 (ABA 6th ed 2007) (citing cases); see also Nathan Crystal, *False Testimony by Criminal Defendants: Still Unanswered Ethical and Constitutional Questions*, 2003 U Ill L Rev 1529, 1553–54 (discussing cases); Philip J. Grib, *A Lawyer's Ethically Justified "Cooperation" in Client Perjury*, 18 J Legal Prof 145, 167 (1993) ("Mere suspicion, belief, possibility or even probability that [the client] would lie would not preclude putting him on the stand.").

<sup>160</sup> See MRPC R 3.3(a), 3.3(b) (cited in note 1). The lawyer must first try to persuade the client to testify truthfully or not to testify. If that fails, the lawyer must withdraw. If withdrawal is not practicable, in most jurisdictions, the lawyer must allow the accused to give evidence in narrative form, without questions from the lawyer. If the lawyer acquires the knowledge after the client has already testified, the lawyer must take "reasonable remedial measures": He must attempt to persuade the client to retract the testimony, withdraw if this fails, and if withdrawal is not permitted or "will not undo the effect of the false evidence," he must disclose the perjury to the tribunal. MRPC R 3.3 cmts 1, 10 (cited in note 1).

<sup>161</sup> MRPC R 3.3 cmt 7 (cited in note 1). The US Supreme Court, however, has held that the US Constitution does not require criminal defense attorneys to allow clients to testify falsely. *Nix v Williams*, 475 US 157, 173–74 (1986).

<sup>162</sup> On the right "to present a complete defense" generally, see *California v Trombetta*, 467 US 479, 485 (1984); *Crane v Kentucky*, 476 US 683, 690 (1986).

jury or the court to determine.<sup>163</sup> Proponents of this position argue further that the duty of confidentiality prohibits lawyers from disclosing to the court that a client intends to or has testified falsely.<sup>164</sup>

Inquisitorial systems also do not expect intervention by criminal defense attorneys who know that their clients are about to testify falsely. This may appear surprising, given these systems' professed commitment to the search for the "objective" truth. But it can be explained by looking at inquisitorial procedures for testimony by criminal defendants. To encourage defendants to speak, inquisitorial systems allow defendants to give unsworn statements. Indeed, in most inquisitorial systems, if criminal defendants do speak to the court, their only option is to give an unsworn statement.<sup>165</sup> Because defendants face no penalty for giving a false statement, lawyers are also not expected to discourage them from doing so. Lawyers may even tell their clients that they will not be sanctioned for perjury if they make a false statement.<sup>166</sup> Lawyers would breach their duty to the court only if they go further and actually advise the client to give untruthful statements.<sup>167</sup> Apparently, some inquisitorial systems, such as France, tend to tolerate even such conduct in practice.<sup>168</sup>

Reflecting this inquisitorial approach, the ICC also gives defendants the right to make unsworn statements in their defense.<sup>169</sup> Unlike in inquisitorial systems, defendants who choose to speak to the court are not obliged to do so through an unsworn statement. They may also testify as ordinary witnesses by giving "an undertaking as to the truthfulness of the evidence."<sup>170</sup> Unsworn statements have lower probative value (indeed, an alternative view is that they have no probative value at all<sup>171</sup>), but a number of defendants may prefer to give such statements because they could still present their position while not running the risk of a perjury prosecution or a sentence enhancement for untruthful

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<sup>163</sup> See, for example, *State v McDowell*, 669 NW2d 204, 224 (Wis 2003) (stating that the attorney has a duty to preserve his or her client's right to testify); *Nix*, 475 US at 189 (Blackmun concurring) (citing *United States ex rel Wilcox v Johnson*, 555 F2d 115, 122 (3d Cir 1977)).

<sup>164</sup> Freedman, 64 Mich L Rev at 1477–78 (cited in note 65).

<sup>165</sup> Giuliano Turone, *The Denial of the Accused's Right to Make Unsworn Statements in Delalić*, 2 J Intl Crim Just 455, 455 (2004).

<sup>166</sup> See, for example, Beulke, *Der Verteidiger im Strafverfahren* at 154 (cited in note 145); Bottke, 96 Zeitschrift für die Gesamte Strafrechtswissenschaft at 756 (cited in note 145).

<sup>167</sup> See, for example, Beulke, *Der Verteidiger im Strafverfahren* at 154–55 (cited in note 145); Bottke, 96 Zeitschrift für die Gesamte Strafrechtswissenschaft at 757–58 (cited in note 145).

<sup>168</sup> Lerner, 2001 U Ill L Rev at 827 (cited in note 69).

<sup>169</sup> ICC Statute, Art 67(1)(h).

<sup>170</sup> Id, Art 69(1).

<sup>171</sup> William A. Schabas, *Article 67: Rights of the Accused*, in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court* 1247, 1269 (Hart 2d ed 2008).



testimony. Defense attorneys, particularly those from civil-law systems, may also encourage defendants to give unsworn statements, in order to avoid confronting the risk of perjury, or simply because they are accustomed to this type of evidence from their practice in their home jurisdiction.<sup>172</sup>

Particularly given the possibility that a defendant may give an unsworn statement, there is a strong argument that defense lawyers must do what is in their power to prevent false sworn testimony by their clients at the ICC. If they know that a client intends to testify falsely, they should first attempt to persuade the client to testify truthfully or refrain from testifying. If that fails, they should ensure that the client give an unsworn statement, rather than one under oath. Allowing a client to give a false statement of any kind—whether sworn or not—creates a conflict with the attorneys' duty of candor and the truth-seeking goal of international criminal trials. But the conflict is at least reduced when the statement is unsworn. Allowing such a statement also permits the lawyer to avoid the problematic alternative of withdrawing as counsel and allows the defendant to have his say without making the attorney complicit in false testimony. Finally, lawyers should not participate in eliciting even unsworn statements that they know to be false; instead, they should let the client present such statements in a narrative form.

The "unsworn statement" in narrative form appears to offer a reasonable compromise between the competing interests at issue—on the one hand, the right of the defendant to speak in his own defense, and the lawyer's duties of loyalty and confidentiality; on the other, the fundamental goal of international criminal trials to seek the truth and the lawyer's duty of candor to the court. Other possible responses to the contemplated perjury all appear inferior in their ability to accommodate these competing interests. These other options include: withdrawal from the case; disclosing the intended or completed perjury to the court; doing nothing and simply allowing the client to testify falsely under oath; and finally, allowing the client to give sworn narrative testimony under oath.<sup>173</sup> It is useful to consider each of these before returning to the benefits of the unsworn narrative statement.

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<sup>172</sup> See id at 1268 (reporting that continental European jurists are "astonished" that a defendant who chooses to testify may be required to do so under oath).

<sup>173</sup> All of these approaches, of course, assume that the lawyer has been unsuccessful in persuading the client to testify truthfully or not to testify at all. If the lawyer succeeds in this endeavor, this resolves the dilemma. In practice, the lawyer will often be able to dissuade the client from testifying falsely, particularly when the lawyer has already built a good relationship of trust and respect with the client. L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 Fordham L Rev 1707, 1728–29 (2007). But when the lawyer fails in this attempt, the dilemma reappears, and the lawyer must contemplate his next step in response.

If the client insists on testifying in a manner that the defense attorney knows to be false, the US Model Rules and a number of commentators suggest that the lawyer should withdraw from representation. This action would certainly be consistent with the lawyer's duty of candor to the court. At the same time, it places the client and court in a difficult position. It disrupts the proceedings and leaves the client without a lawyer until a replacement is found and brought up to speed. If trial has already begun, withdrawal will often be impractical, and courts might not even permit it.<sup>174</sup> Finally, withdrawal merely shifts the ethical problem to the next lawyer representing the defendant and risks further withdrawals, delays, and disruptions.

In some circumstances, when withdrawal is not feasible, authorities suggest that the only way to comply with the duty of candor is to inform the court of the client's intention to give false testimony.<sup>175</sup> This also appears to be the only effective remedial measure after the client has already testified falsely.<sup>176</sup> But disclosure is obviously problematic in that it violates the lawyer's solemn duty to keep confidential the information obtained from the client in the course of the professional relationship.

Some commentators from adversarial systems have argued that if the client insists on testifying, even if the lawyer knows that the testimony will be false, the lawyer should not stand in the way. They reject withdrawal as impractical and see disclosure to the court as a breach of the duty of confidentiality and a violation of the client's right to effective defense.<sup>177</sup> Moreover, some adopt the argument that lawyers can never "know" with absolute certainty that testimony is false, and can thereby evade the entire question on this ground.<sup>178</sup> But the option of allowing a client to commit perjury in an international criminal trial is not an appropriate resolution of the underlying ethical dilemma. As described earlier, both the adversarial and inquisitorial traditions ultimately reject this approach, albeit for different reasons. Condoning client perjury is especially inappropriate at international criminal trials, which place a premium on uncovering the

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<sup>174</sup> Crystal, 2003 U Ill L Rev at 1539 (cited in note 159).

<sup>175</sup> See *id.* at 1541–43.

<sup>176</sup> See MRPC R 3.3(a)(3) (cited in note 1) (“[A] lawyer shall take reasonable remedial measures [if false information is brought to his or her attention], including, if necessary, disclosure to the tribunal.”). Another possibility is for the defendant to recant the false statement, but this will typically be more prejudicial to his case.

<sup>177</sup> See Freedman, 64 Mich L Rev at 1476–78 (cited in note 64); Monroe H. Freedman, *Controversial No More—The Perjury Trilemma Revisited*, 9 Prof Law 2 (Summer 1998); Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 Vand L Rev 339, 413–23 (1994).

<sup>178</sup> Freedman, 9 Prof Law at 2 (cited in note 177); see also Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 Hofstra L Rev 1041, 1049, 1051–52 (1997).

historical truth. And at the ICC, it is unnecessary to allow perjury to accommodate the defendant's interest in speaking on his own behalf, since the defendant can do so by providing an unsworn statement.

A final possible response, preferred by many American state jurisdictions, is for the defendant to give evidence in narrative form, without any active participation by the lawyer.<sup>179</sup> Under this approach, the defendant exercises his right to testify, while the lawyer effectively disassociates himself from the testimony and complies with his duty of candor to the court. The narrative testimony approach might be seen to disclose implicitly the lawyer's doubts about the veracity of the testimony. In the American context, the jury may not understand this meaning of the narrative testimony.<sup>180</sup> But the judge is likely to interpret it as a sign that the defense attorney wishes to distance himself from the client's statements. Admittedly, this is likely to be the case in bench trials such as those at international courts. The disclosure is never explicit, however, and the reasons must only be supposed—thus preserving client confidentiality—and the judges will still have the opportunity to evaluate the veracity of the defendant's statement in light of other evidence in the case. The narrative testimony approach thus has many attractive features when compared to the alternatives.

At the ICC, a similar approach can be adopted, but improved upon from the perspective of attorney ethics, by making the statement unsworn. An unsworn statement delivered in narrative form offers a reasonable solution to the dilemmas faced by a defense attorney whose client insists on making a statement that the attorney knows to be false. It does not unduly compromise the defendant's right to effective representation, and the lawyer could still participate in eliciting those unsworn statements that the lawyer believes to be truthful. The lawyer is not forced to entirely abandon the defendant and create logistical problems for the court by withdrawing. Nor does the lawyer directly reveal client confidences. Although the court may surmise the significance of the unsworn statement—in other words, that the lawyer doubts its veracity—this indirect and attenuated harm to the duty of confidentiality may be justified in order to preserve the defense attorney's obligation to avoid participating in the presentation of false testimony. It is also a better fit with the purpose of uncovering the historical truth, one of the central purposes of international criminal trials.

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<sup>179</sup> See, for example, *McDowell*, 669 NW2d at 225; *People v Johnson*, 72 Cal Rptr 2d 805, 817 (1998); see also Crystal, 2003 U Ill L Rev 1547–48 (cited in note 159).

<sup>180</sup> See, for example, *Commonwealth v Mitchell*, No Crim A 9673 CR0312, 2000 WL 33119695, at \*26 (Mass Super Ct 2000); Crystal, 2003 U Ill L Rev at 1566 (cited in note 159).

A commentary to the ICC Code of Conduct could clarify the duties of counsel when a client insists on making a statement that counsel knows is false. (Again, I am not addressing the scenario where the attorney merely doubts his client—as discussed previously, an attorney must resolve reasonable doubts in favor of the client). The commentary could explain that, if an ICC defense counsel is faced with a scenario in which the attorney knows that the client plans to testify falsely, whether from express admissions by the client or from overwhelming circumstantial evidence, the lawyer ought to take steps to address the problem. First, the attorney should confront the client with the problem of potential perjury and try to persuade him to testify truthfully or otherwise not to testify. In doing so, the attorney should explain his own ethical duty not to be complicit in presenting perjured testimony, as well as the strategic risks of presenting such testimony (for example, that the client's story may fall apart under cross-examination and hurt the case more than remaining silent would). If the client persists in his desire to testify untruthfully, the lawyer should insist that the client give an unsworn statement in narrative form. In most cases, the client is likely to be satisfied by this opportunity to state his position, and the court will have the opportunity to assess its veracity in light of the other evidence presented. Only if the client refuses to do so should the lawyer attempt to withdraw.

The commentary should urge lawyers not to simply ignore the client's intent to commit perjury.<sup>181</sup> The cost to the truth-seeking function of international criminal trials is too high. Moreover, the need to fulfill the defendant's right to speak on his own behalf, without foregoing representation, is suitably accommodated by the option of providing an unsworn statement. The possibility of guiding the client to give such a statement provides a reasonable middle ground between the adversarial and inquisitorial traditions, as well as between competing goals of international criminal law.

### C. Representing an Innocent Client Who Wants To Plead Guilty

Another area that gives rise to difficult ethical questions for criminal defense attorneys concerns the division of authority between the client and the lawyer over the direction of the case. When must a lawyer defer to the client's decisions about the course of representation, and when is such deference inappropriate? The clash between client and lawyer decision-making can occur in

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<sup>181</sup> In most jurisdictions in the US, the scenario would play out similarly, except that the option of giving an unsworn statement would not be available. See note 160.

a number of areas, such as the decisions whether the accused should assert certain defenses and whether he should testify.

The first example I discuss concerns the decision by an innocent defendant to plead guilty. Such occasions are not everyday occurrences,<sup>182</sup> but are not as rare as they might first appear. The defendant may decide to admit guilt because he is concerned about his chances of acquittal at trial and prefers the sentence reduction that a guilty plea offers.<sup>183</sup> He may want to accept responsibility for the crime to protect loved ones who were involved.<sup>184</sup> Finally, in organized crime and international crimes cases, the defendant may admit guilt to protect family members who may suffer adverse consequences unless he accepts full responsibility for the crime and refuses to cooperate in the investigation of accomplices.<sup>185</sup> In many of these cases, given the defendant's statements to the contrary, the lawyer may not even suspect that innocence is a possibility. But occasionally, information in the case (for example, a corroborated alibi that the client now unconvincingly claims is false) may lead the attorney to believe that the client is innocent.

If the lawyer strongly suspects that the client is innocent of all or some of the charges, what are the lawyer's duties under the circumstances? Should the lawyer persuade the client to plead not guilty, attempt to defend the client despite his objections, bring the matter to the court's attention, or withdraw? This is a scenario in which the tension between the duty to the client and duty to the court resurfaces. Both the inquisitorial approach and international criminal law's pedagogic and truth-seeking goals would suggest that the lawyer must first try to persuade the client to contest the charges and, if that fails, bring the matter to the court when the lawyer has a firm basis to believe that the client is in fact innocent. This approach would also seem to be the most consistent with the attorney's duty not to deceive or mislead the court.<sup>186</sup>

The Codes of Conduct of international criminal courts generally give clients authority over decisions concerning the *objectives* of representation.

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<sup>182</sup> The more common ethical quandary of American criminal defense attorneys is how strenuously they should try to persuade a client to plead guilty when there is overwhelming evidence against the client, but the client insists that he is innocent. See, for example, Anthony Amsterdam, 1 *Trial Manual 5 for the Defense of Criminal Cases* 339 (1988).

<sup>183</sup> Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L J 1179, 1296–97 (1975).

<sup>184</sup> Kretschmer, *Der Strafrechtliche Parteiverrat* at 50–51 (cited in note 145).

<sup>185</sup> For a fictional twist on this scenario in an international criminal case, see Peter Robinson, *The Tribunal* 124, 207 (iUniverse 2004).

<sup>186</sup> As I discuss later, a plea is supposed to reflect the facts of the case. If an attorney leads the court to believe that a client is guilty when the attorney knows that the client is innocent, this stands in tension with the attorney's duty under Article 24 not to deceive or knowingly mislead the court. See ICC Code of Prof'l Conduct, Art 24(3).

Lawyers maintain authority over the *means* of representation, although they must consult with their clients before making a decision.<sup>187</sup> Lawyers may also refuse to follow clients' instructions concerning objectives of representation if these instructions are "inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code [of Conduct]."<sup>188</sup> Furthermore, lawyers may withdraw from representation, with the court's consent, if their client insists on pursuing an objective they consider repugnant.<sup>189</sup>

The decision to plead guilty concerns the objectives of representation. The answer under the ICC Code of Conduct may therefore appear clear: If a decision concerns objectives, then the client should have the final say. But when an innocent defendant pleads guilty, he is also effectively lying to the court. This raises the question whether an attorney can knowingly participate in the falsehood. More broadly, the conviction of an innocent person is inconsistent with the fair administration of justice. This raises the additional question whether counsel has a duty to ensure the fairness of the proceedings independent of his duty to the client.

These questions have been debated at length in the US, where the dominant view emphasizes the autonomy of the client to make key choices about his case, including whether to plead guilty. Both constitutional rights and rules of professional responsibility have been interpreted in ways that promote the defendant's autonomy and limit the attorney's ability to override client decisions concerning the objectives of representation. Constitutional doctrine holds that the decision to plead guilty is a fundamental choice that, under the

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<sup>187</sup> The ICC Code of Conduct requires counsel to:

(a) Abide by the client's decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code; and (b) Consult the client on the means by which the objectives of his or her representation are to be pursued.

ICC Code of Prof'l Conduct, Art 14(2). Similarly, ICTR and ICTY Codes of Conduct require counsel to "abide by the client's decisions concerning the objectives of representation" unless those decisions violate ethical duties. ICTR, Code of Professional Conduct for Defence Counsel, Art 4(2)(a) (Mar 14, 2008); Code of Professional Conduct for Counsel Appearing Before the International Tribunal ("ICTY Code of Prof'l Conduct"), Arts 8(B)(i), 8(C), ICTY Doc IT/125/Rev.3 (July 22, 2009). At the SCSL, the rules grant counsel greater independence and provide that counsel does not have to abide by a client's decision if it is "inconsistent with counsel's . . . best professional judgement." Code of Professional Conduct for Counsel with the Right of Audience before the Special Court of Sierra Leone, Art 14(a)(ii) (May 13, 2006).

<sup>188</sup> ICC Code of Prof'l Conduct, Art 14(2).

<sup>189</sup> Id, Art 18(1)(a); ICTY Code of Prof'l Conduct, Arts 9(B)(i), 9(B)(ii) (cited in note 187) (allowing withdrawal in the ICTY if counsel considers the objectives repugnant or imprudent or if the client "persists in a course of action involving counsel's services that counsel reasonably believes is criminal or fraudulent").

Sixth Amendment, “the accused has the ultimate authority to make.”<sup>190</sup> Courts have supported the defendant’s freedom to decide key questions about his representation, even if these decisions are “ultimately to his own detriment.”<sup>191</sup> Of course, courts are generally free to reject plea agreements that they find to be without factual basis. But the decision to plead guilty remains the prerogative of the defendant.

Following a similar understanding of defendants’ autonomy, American courts have also allowed defendants to tender guilty pleas even while protesting their innocence.<sup>192</sup> As two lower courts, cited by the Supreme Court in the decision affirming this rule, explained: “An accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty.”<sup>193</sup> Furthermore, “[r]easons other than the fact that he is guilty may induce a defendant to so plead . . . and he must be permitted to judge for himself in this respect.”<sup>194</sup> As long as the decision of the defendant is competent, informed, and voluntary, it should be respected, regardless of whether it advances or harms the defendant’s interests.<sup>195</sup>

Ethical rules in the US also emphasize the authority of criminal defendants to make critical choices about their representation. The Model Rules view the lawyer-client relationship as one of agency and require the lawyer to follow the client’s wishes as to the ends of representation, as long as they are not illegal.<sup>196</sup> This is generally true in other common-law jurisdictions as well,<sup>197</sup> with the caveat that English barristers, as a general principle, are required to exercise their own personal judgment in all professional activities.<sup>198</sup> Model Rule 1.2(a) specifically provides that, “[i]n a criminal case, the lawyer shall abide by the

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<sup>190</sup> *Jones v Barnes*, 463 US 745, 751 (1983).

<sup>191</sup> *Faretta v California*, 422 US 806, 834 (1975); see also *Flanagan v United States*, 465 US 259, 268 (1984) (affirming that with respect to the decision whether to choose self-representation, “the defendant’s free choice [is protected] independent of concern for the objective fairness of the proceeding”).

<sup>192</sup> *North Carolina v Alford*, 400 US 25, 37 (1970). The trial court must still review the plea to ensure that it is voluntary, knowing, and rests on a strong factual basis.

<sup>193</sup> *McCoy v United States*, 363 F2d 306, 308 (DC Cir 1966).

<sup>194</sup> *State v Kaufman*, 2 NW 275, 276 (Iowa 1879) (dictum).

<sup>195</sup> As noted earlier, guilty pleas must also rest on a factual basis, but in practice, review of the factual basis is often perfunctory. See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 Am J Comp L 199, 212–13 (2006).

<sup>196</sup> MRPC R 1.2(a), 1.2(a) cmt 1 (cited in note 1).

<sup>197</sup> Hazard and Dondi, *Legal Ethics: A Comparative Study* at 177–78 (cited in note 53) (contrasting lawyer-client relationships in civil-law jurisdictions with those in common-law jurisdictions).

<sup>198</sup> *Id.*

client's decision, after consultation with the lawyer, as to a plea to be entered . . . ."<sup>199</sup> Given these provisions, it is not surprising that a recent survey of American public defenders found that 99.4% of the respondents indicated that "if there were disagreement about the decision to accept or reject a plea bargain, the final call would be the client's."<sup>200</sup>

Some commentators have argued, however, that when the lawyer knows that the client is innocent, allowing the client to plead guilty would breach the lawyer's duty of candor to the court. Former Chief Justice Warren Burger, speaking in his personal capacity, once argued that "[w]hen an accused tells the court he committed the act charged to induce acceptance of the guilty plea, the lawyer to whom contrary statements have been made owes a duty to the court to disclose such contrary statements so that the court can explore and resolve the conflict."<sup>201</sup> Unless the lawyer reveals the conflict to the court, the lawyer would effectively be allowing his client to present perjured testimony, in breach of his duty of candor.<sup>202</sup> Of course, the cases in which the lawyer "knows" that his client is innocent can be expected to be relatively few, given that at least some evidence to the contrary has ordinarily been gathered by the police and prosecution. Under the Model Rules, the lawyer has another possible option in these circumstances—to withdraw. The Rules allow a lawyer to withdraw if the client insists on an action with which the lawyer fundamentally disagrees, or "if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is . . . fraudulent."<sup>203</sup> The client's insistence on a false guilty plea may provide a cause for withdrawal under either of these provisions.

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<sup>199</sup> MRPC R 1.2(a) (cited in note 1).

<sup>200</sup> Rodney J. Uphoff and Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U Kan L Rev 1, 39–40 (1998). But see Alschuler, 84 Yale L J at 1279 (cited in note 176) (reporting results from interviews with defense attorneys in the 1970s, in which interviewees had "adopted widely differing attitudes toward the propriety of entering guilty pleas on behalf of defendants who asserted their innocence").

<sup>201</sup> Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 Am Crim L Q 11, 15 (1966-67); see also David G. Bress, *Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpoint*, 5 Am Crim L Q 23, 27 (1966-67). But see Alschuler, 84 Yale L J at 1296–97 (cited in note 183); Josh Bowers, *Punishing the Innocent*, 156 U Pa L Rev 1117, 1173 (2008); Addison M. Bowman, *Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpoint*, 5 Am Crim L Q 28, 31 (1966-67).

<sup>202</sup> See Section III.B.

<sup>203</sup> MRPC R 1.16(b)(2) (cited in note 1); see also *Red Dog v State*, 625 A2d 245, 247–48 (Del 1993) (holding that the defendant's decision to accept death penalty was not, in itself, irrational; if the lawyer is unable to represent a client who makes such a decision, or if death penalty is repugnant to lawyer, the lawyer may seek to withdraw as long as the client is not prejudiced).



In contrast to the adversarial approach, which tends to emphasize the defendant's autonomy to make decisions about the case, inquisitorial systems place a greater value on a lawyer's independence from clients.<sup>204</sup> French *avocats*, for example, are expected to be more distant from their clients than their British or American counterparts. They are not seen strictly as agents of their clients and are not required to follow clients' instructions about the objectives of representation.<sup>205</sup> Similarly, most German authorities argue that criminal defense attorneys do not always need to follow their clients' instructions, but are instead supposed to determine independently what is in the best interests of the clients. Commentators have grounded this conclusion in the principle of lawyer independence<sup>206</sup> as well as in lawyers' duty as "organs of the administration of justice."<sup>207</sup> Under this more paternalistic approach, German lawyers are expected to serve as guardians of the client's interests and to ensure that the client receives a fair trial, even if the client gives instructions to the contrary.<sup>208</sup> Reflecting an inquisitorial influence, the pan-European legal ethics code (CCBE Code), which aims to harmonize ethics rules for lawyers in the European Union, also emphasizes "more that attorneys protect clients' interests than that they abide by client instructions."<sup>209</sup> Article 2.7 of the CCBE Code requires that "[s]ubject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of the client."<sup>210</sup> In other words, even if the defendant chooses, for whatever reason, not to mount a vigorous defense, if the lawyer believes that it would be in the defendant's "best interests" to zealously pursue all defenses available, the lawyer must choose the latter course. The client is not the only or final arbiter of what type of representation is in his own best interests. In inquisitorial systems, this is ultimately a question of the lawyer's professional judgment.

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<sup>204</sup> Roger C. Cramton, *A Comparative Look at the Ethics Rules and Professional Ideologies in a Time of Change*, in John J. Barcelo III and Roger C. Cramton, eds, *Lawyers' Practice and Ideals: A Comparative View* 267, 269 (Kluwer 1999) (comparing the French and American systems).

<sup>205</sup> Id; Leubsdorf, *Man in His Original Dignity: Legal Ethics in France* at 15–16 (cited in note 48).

<sup>206</sup> Harting, *Berufspflichten des Strafverteidigers und Sanktionierung Pflichtwidrigen Verhaltens* at 120, 122 (cited in note 144).

<sup>207</sup> See, for example, Kretschmer, *Der Strafrechtliche Parteiverrat* at 48–49 (cited in note 145).

<sup>208</sup> See, for example, id at 48–49 (citing numerous authorities in support).

<sup>209</sup> Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 Mich J Int'l L 341, 370 (2002) (citing Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Part 1: An Analysis of the CCBE Code of Conduct*, 7 Geo J Legal Ethics 1, 36 (1993)).

<sup>210</sup> Council of Bars and Law Societies of Europe, Code of Conduct for European Lawyers Art 2.7 (2006).

The “best interests” approach to attorney-client relations would suggest that a lawyer need not follow the instructions of a client who wants to plead guilty when evidence exists to prove his innocence. Indeed, some German commentators have argued that a lawyer is required, as part of his duty as an “organ of the administration of justice,” to present to the court exculpatory or mitigating evidence, even when the client has instructed the lawyer to the contrary. One example discussed by commentators concerns a husband client who tells his lawyer that he has not committed the crime in question, that his girlfriend was the actual perpetrator, and that a certain witness can confirm this. But the client adds that he is not interested in revealing the truth to the court, because he wants to hide the extramarital affair from his wife.<sup>211</sup> In this and other similar scenarios (including in deciding whether to assert an insanity defense),<sup>212</sup> the dominant view among German courts and commentators is that a lawyer should act according to his own professional judgment concerning the client’s best interests.<sup>213</sup> The lawyer may therefore disregard his client’s instructions, call the exculpatory witness to the stand, and generally conduct a vigorous defense of the client whom he believes to be innocent. At the very least, lawyers should consider withdrawing from representation when, despite their firm belief in the client’s innocence, they fail to convince the client to contest the charges.<sup>214</sup>

A more paternalistic approach to the attorney-client relationship, akin to that used in inquisitorial systems, would be a more appropriate fit for international criminal courts in these circumstances. Such an approach would be consistent with both the truth-seeking and educational goals of international criminal law. Allowing the client to tender a false admission of guilt clashes with the goal to uncover the historical truth about the crimes in question. If the defendant accepts responsibility, the actual perpetrator remains unknown. Particularly when a lower-level operative pleads guilty to crimes he did not commit to shield higher-ups from exposure, his actions distort the historical record and obscure the inner workings of a criminal regime. The failure to bring

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<sup>211</sup> Kretschmer, *Der Strafrechtliche Parteiverrat* at 49–50 (cited in note 145) (citing Beulke, *Der Verteidiger im Strafverfahren* at 86, 124 (cited in note 145)).

<sup>212</sup> Another example that Kretschmer gives is that of a wife who claims she was the one who drove drunk, in order to save her husband from losing his driver’s license, since he needs to have the license in order to keep his job. *Id.* at 51.

<sup>213</sup> See, for example, Harting, *Berufspflichten des Strafverteidigers und Sanktionierung Pflichtwidrigen Verhaltens* at 119–20 (cited in note 144); Beulke, *Der Verteidiger im Strafverfahren* at 124 (cited in note 145). But see Kretschmer, *Der Strafrechtliche Parteiverrat* at 52 (cited in note 145) (disagreeing with this view).

<sup>214</sup> Harting, *Berufspflichten des Strafverteidigers und Sanktionierung Pflichtwidrigen Verhaltens* at 120 (cited in note 144); see also Dahs, *Handbuch des Strafverteidigers* at 38 Rn 52 (cited in note 144).

to account those most responsible impedes efforts to prevent revisionism and future conflicts in the affected territory.

In addition to distorting the historical record, false admissions of guilt could undermine the legitimacy of international criminal justice. In most cases in which an innocent defendant admits guilt with the acquiescence of his attorney, the falsity of the admission will not be uncovered. Still, in some cases, evidence exonerating the defendant may surface later. The discovery of such wrongful convictions would seriously damage public confidence in the international criminal trials and undercut the ability of these trials to promote the rule of law and human rights.

The procedural regime on admissions of guilt at the ICC reflects these concerns. Departing from the more traditional guilty-plea model of the ICTY and ICTR, the ICC Statute allows for “proceedings on admission of guilt” only when the court, after a thorough examination of the evidence, is convinced that the facts support such an admission. Whereas at the ICTY and ICTR, the factual basis may rest on the “lack of any material disagreement between the parties about the facts of the case,”<sup>215</sup> at the ICC, judges must independently review the available evidence to determine whether the facts support the admission of guilt. Indeed, ICC judges may call on the prosecutor to present additional evidence if they believe “that a more complete presentation of the facts of the case is required in the interests of justice.”<sup>216</sup> These provisions of the ICC Statute reflect the inquisitorial discomfort with guilty pleas that do not fully reflect the underlying facts of the crime.

Given the preoccupation of the ICC Statute drafters with ensuring that admissions of guilt reflect the true facts of the crime, it would appear anomalous if counsel could acquiesce in the client’s decision to present a false admission of guilt. Instead, the more fitting response by counsel would be to bring concerns about the falsity of the guilty plea to the court and let the court decide if the defendant should in fact be allowed to admit guilt. This action would be consistent with counsel’s duties not to mislead the court.<sup>217</sup>

Some may object that this case is similar to that of a lawyer allowing a client to give a false unsworn statement to the court. If a lawyer is allowed to acquiesce in a decision by a client to make a false unsworn statement, then the lawyer should similarly be allowed to acquiesce in a false admission of guilt. But

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<sup>215</sup> ICTY Rules of Procedure and Evidence, UN Doc IT/32/Rev.43 at 62 *bis* (iv) (2009).

<sup>216</sup> ICC Statute, Art 65(4). As in the ICTY, ICTR and most domestic jurisdictions, “no contest” and *Alford* pleas (in which the defendant protests his innocence) are also unlikely to be allowed. See *Prosecutor v Erdemović*, Case No IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 29–31 (Oct 7, 1997).

<sup>217</sup> ICC Code of Prof'l Conduct, Art 24(3).

in the “unsworn statement” scenario, the defendant and the lawyer make no representation to the court about the truth of the statement. By contrast, under the ICC Statute, an admission of guilt is expected to conclusively reflect the facts of the case.<sup>218</sup> For that reason, the lawyer has a stronger duty to reveal the falsity of the admission of guilt in the latter circumstance.

It is likely, of course, that if counsel reveals or even threatens to reveal to the court exculpatory evidence that the client wishes to keep secret, the relationship between the client and the lawyer would deteriorate significantly. If that happens, the client may dismiss the lawyer. Alternatively, the lawyer may withdraw, consistent with Article 18 of the ICC Code of Conduct, on the grounds that the client insists on pursuing an objective that counsel considers repugnant. Withdrawal, while a reasonable response, will most likely just shift the problem to another attorney, so it is not the optimal resolution of the dilemma. In addition, both withdrawal and dismissal by the client may lead to more cases of self-representation by defendants. Despite these potential repercussions for the lawyer-client relationship, disclosure to the court (or alternatively, withdrawal), remains a superior option to acquiescing in the conviction of an innocent defendant.

In discussing the allocation of decision-making between attorneys and their clients, therefore, the commentary to the ICC Code of Conduct should advise defense attorneys that they would not be breaching their duties to their client by refusing to acquiesce in a false admission of guilt. Instead, by disclosing the falsity of the admission of guilt to the court, the attorneys would be fulfilling their duty of candor to the court, acting in the best interests of the client, and helping to ensure a fair outcome in the case. The commentary should also discuss withdrawal as an appropriate response in this situation, while noting that withdrawal does not resolve the dilemma, but likely shifts the burden to another attorney. These comments would be especially helpful in guiding the conduct of lawyers from adversarial traditions, under which attorneys are encouraged to follow their clients’ instructions even if they disagree with them. Because of the possible conflict with the adversarial approach to this question, as Section IV discusses in greater detail, the commentary should not at this point provide for sanctions of lawyers who follow that approach.

#### D. Representing a Client Who Wants To Boycott the Proceedings

A second scenario concerning the division of authority between client and lawyer occurs frequently at international criminal courts. It concerns the

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<sup>218</sup> ICC Statute, Art 65(1)–(2).

question of whether a lawyer ought to follow a client's instructions to boycott or otherwise disrupt the proceedings. Again, the lawyer's duties to the court, as well as the special goals of international criminal law, suggest that the lawyer should decline to follow such instructions and withdraw from the case if necessary. Contrary to some decisions by international criminal tribunals, however, this Section argues that if the boycotting defendant unequivocally terminates the lawyer's mandate, the lawyer's duty to the court does not require counsel to continue representing the defendant against his wishes. Instead, when a defendant persists in disrupting the proceedings and refuses the assistance of counsel, counsel's withdrawal from representation is an appropriate and reasonable response. In an effort to ensure the fairness and efficiency of the proceedings, the court could still appoint the same or another attorney to act in a somewhat different role, as standby counsel.

Disagreements between defense counsel and their clients about participation in the proceedings are not uncommon at international criminal courts.<sup>219</sup> A well-known example is the case of Jean-Bosco Barayagwiza, a former official in the Rwandan Ministry of Foreign Affairs, who was charged with genocide and crimes against humanity at the ICTR. After an unfavorable decision by the ICTR Appeals Chamber, Barayagwiza sent a letter to the tribunal claiming that the court would not be able to render "independent and impartial justice,"<sup>220</sup> declaring that he would not attend the proceedings against him, and stating that he had instructed his attorneys not to represent him further.<sup>221</sup> Barayagwiza's lawyers, who had been assigned by the tribunal to represent the defendant because he could not afford counsel, filed a motion to withdraw in response to their client's letter.<sup>222</sup>

The ICTR Chamber refused to allow the withdrawal, citing to ICTR Rule 45(I), which permitted assigned counsel to withdraw only "in the most exceptional circumstances."<sup>223</sup> The Chamber explained that it wished to provide Barayagwiza "the opportunity for further reflection" and that denial of the

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<sup>219</sup> See, for example, *Prosecutor v Taylor*, Case No SCSL-2003-01-T, Transcript of Prosecution Opening Statement, 8–10, 18–26 (June 4, 2007); *Prosecutor v Sesay*, Case No SCSL-04-15-T-285, Gbao—Decision on Appeal against Decision on Withdrawal of Counsel, ¶¶ 14–28 (Nov 23, 2004); *Prosecutor v Milošević*, Case No IT-02-54-T, Decision on Assigned Counsel's Motion for Withdrawal, ¶¶ 5–7 (Dec 7, 2004); *Prosecutor v Barayagwiza*, Case No ICTR 97-19-T, Decision on Defense Counsel Motion to Withdraw, ¶¶ 17–19 (Nov 2, 2000).

<sup>220</sup> Ntanda Nsereko, 12 Crim L F at 501 (cited in note 12); *Barayagwiza*, Case No ICTR 97-19-T, Decision on Defense Counsel Motion to Withdraw at ¶ 5 (quoting Barayagwiza's letter).

<sup>221</sup> Ntanda Nsereko, 12 Crim L F at 501 (cited in note 12).

<sup>222</sup> Id; see also *Prosecutor v Nahimana*, Case No ICTR-99-52-T, Judgment, ¶ 83 (Dec 3, 2003).

<sup>223</sup> *Barayagwiza*, Case No ICTR 97-19-T, Decision on Defense Counsel Motion to Withdraw at ¶ 8.

motion to withdraw was “in the interest of preserving the Accused’s rights.”<sup>224</sup> Still, Barayagwiza persisted in his boycott, so the attorneys filed another motion to withdraw. The attorneys argued that continued representation would violate the ICTR Code of Conduct, as well as their national ethical codes, which prohibit counsel from representing a client who has terminated their mandate.<sup>225</sup> The Chamber dismissed their argument. It pointed out that Barayagwiza’s instructions for counsel not to defend him were an attempt to boycott and obstruct judicial proceedings and therefore counsel were not under an obligation to follow them. Furthermore, the court held that, under the ICTR Rules and Code of Conduct, counsel were obliged “to mount an active defence in the best interest of the Accused” and to “ensure that the Accused receives a fair trial”; therefore, counsel had to continue representing the defendant despite his wishes to the contrary.<sup>226</sup>

The *Barayagwiza* decision shows how the guardianship approach to lawyer-client relations can be taken too far. It is true that lawyers should not follow instructions by the client to obstruct or otherwise defy the proceedings. Even in adversarial systems, lawyers are prohibited by ethical rules from following a client’s instructions to engage in conduct “intended to disrupt a tribunal.”<sup>227</sup> Under all major ethical regimes, therefore, if the client requests his lawyers to take measures that the lawyers consider frivolous or obstructive, lawyers must refuse to follow the client’s instructions and proceed with the representation according to their best professional judgment.

But when the client completely refuses to cooperate with his lawyers and attempts to terminate their mandate—a particular problem in many international criminal cases—the lawyers’ only viable option is to withdraw. To continue representation, despite instructions to the contrary, would violate national and international Codes of Conduct, which provide that lawyers must halt

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<sup>224</sup> Ntanda Nsereko, 12 Crim L F at 502 (cited in note 12).

<sup>225</sup> *Id.*

<sup>226</sup> *Barayagwiza*, Case No ICTR 97-19-T, Decision on Defense Counsel Motion to Withdraw at ¶ 21. A few months later, after counsel filed another motion to withdraw, the Chamber granted it, upon finding that the defendant had unequivocally terminated the lawyers’ mandate. *Nahimana*, Case No ICTR-99-52-T, Judgment at ¶ 83.

<sup>227</sup> MRPC R 3.5(d) (cited in note 1). The Comment to the Rule elaborates as follows:

The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

*Id.*, cmt 4.

representation when a client unequivocally discharges them.<sup>228</sup> It would also create a serious and persistent tension between the lawyers' duties to consult the client's wishes on his representation and to aid the court in ensuring a fair trial. Continued representation could also create an erroneous public perception that the defendant is fully represented, when in fact counsel are not receiving any instructions from the defendant.<sup>229</sup>

Forcing the lawyers to continue representing a defendant contrary to his wishes, as the ICTR Trial Chamber did in *Barayagwiza*, wrongly stretches the interpretation of counsel's duty to ensure a fair trial. A better approach is that developed subsequently by the ICTY and the Special Court for Sierra Leone (another UN-sponsored, but nationally-based, war crimes court). These courts have allowed counsel of uncooperative defendants to withdraw, but then appointed "standby counsel" or *amici curiae* to assist the courts in providing a fair trial.<sup>230</sup>

Standby counsel are expected to be engaged actively in the proceedings and to be prepared to take over from the accused if the latter unduly disrupts the proceedings.<sup>231</sup> While standby counsel are charged with looking out for the interests of the defendant, they are understood not to be taking directions from the defendant. They are present to ensure the fairness and effectiveness of the proceedings.<sup>232</sup> The special designation as standby counsel makes this mandate clear—to the defendant, the attorney, and the public.<sup>233</sup>

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<sup>228</sup> See, for example, Richard J. Wilson, "Emaciated" Defense or a Trend to Independence and Equality of Arms in Internationalized Criminal Tribunals?, 15 Hum Rts Brief 6, 7 (2008), online at <http://www.wcl.american.edu/hrbrief/15/152.cfm> (visited Nov 21, 2009) (commenting with approval on the withdrawal by Karim Khan, defense attorney for Charles Taylor, after Taylor terminated Khan's mandate in an effort to boycott the proceedings).

<sup>229</sup> Jørgensen, 4 J Intl Crim Just at 73 (cited in note 12).

<sup>230</sup> See, for example, *Prosecutor v Šešelj*, Case No IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defence, ¶¶ 20–27 (May 9, 2003); *Prosecutor v Norman*, Case No SCSL-04-14-T, Transcript, 13–14 (June 14, 2004) (reading Consequential Order on Assignment and Role of Standby Counsel).

<sup>231</sup> Tuinstra, *Defence Counsel in International Criminal Law* at 253 (cited in note 12). In *Prosecutor v Šešelj*, after the defendant continuously disrupted the proceedings, the Trial Chamber asked standby counsel to take over representation from the accused. *Prosecutor v Šešelj*, Case No IT-03-67-PT, Decision on Assignment of Counsel, ¶¶ 79–81 (Aug 21, 2006).

<sup>232</sup> Tuinstra, *Defence Counsel in International Criminal Law* at 252, 252 n 50, 254 (cited in note 12).

<sup>233</sup> See Jørgensen, 4 J Intl Crim Just at 72 (cited in note 12); Tuinstra, 4 J Intl Crim Just at 55–56 (cited in note 12). But see *Prosecutor v Krajišnik*, Case No IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to the Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, ¶¶ 80–81 (May 11, 2007) (separate opinion of Judge Schomburg) (arguing that the position of *amicus curiae* will create conflicts of interest for counsel and that it is better to impose counsel on the accused instead).

The proposed approach of appointing standby counsel offers a reasonable compromise between the inquisitorial and adversarial views of the lawyer-client relationship. In adversarial systems, attorneys are supposed to advance their clients' interests only as the clients define them.<sup>234</sup> For that reason, any appointment of counsel by the court in order to serve the interests of a fair trial is viewed with skepticism.<sup>235</sup> As Mirjan Damaška has commented, in adversarial systems, "the state cannot *impose* counsel on the litigants, for where individual autonomy is extolled, parties must be free to hire and fire their lawyers, no matter how important the issues involved in the case or how skewed the proceedings become when a party chooses to manage his case personally."<sup>236</sup> By contrast, inquisitorial systems commonly allow the imposition of counsel on defendant in serious cases. Such assignment of counsel is seen to be in the best interest of the defendant and to serve the public interest of providing a fair trial.<sup>237</sup>

The option of appointing standby counsel offers a reasonable middle ground between these two traditions, both of which have influenced international criminal law on this question. As the adversarial tradition recognizes, the outright imposition of defense counsel on an obstreperous defendant can be perceived as trying to muzzle the defendant and denying him the right to self-representation. At the same time, allowing a defendant to instruct a lawyer to boycott the trial interferes with the ability to provide a fair trial and harms the legitimacy of the court. The appointment of standby counsel can help the court conduct its proceedings fairly and effectively, without unduly interfering with the defendant's right to self-representation.<sup>238</sup> As noted earlier, compared to court-assigned counsel, the designation of standby counsel also has

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<sup>234</sup> Damaška, *The Faces of Justice and State Authority* at 142 (cited in note 47).

<sup>235</sup> Appointments of stand-by and advisory counsel do exist in adversarial systems to prevent the derailment of the trial by the defendant. See *McKaskle v Wiggins*, 465 US 168 (1984). But the role of these attorneys is quite circumscribed, and their involvement is often disfavored by courts. See, for example, Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 NYU L Rev 676, 684 (2000) (describing courts' ambivalence to assigning standby counsel); Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 Wake Forest L Rev 55, 75 (2003) (noting that courts disfavor "hybrid representation," whereby counsel participates more actively in the case than ordinary stand-by counsel do, in such activities as jury selection, opening statements, examination of witnesses, and closing arguments).

<sup>236</sup> Damaška, *The Faces of Justice and State Authority* at 141–42 (cited in note 47).

<sup>237</sup> See Tuinstra, *Defence Counsel in International Criminal Law* at 246 (cited in note 12).

<sup>238</sup> See, for example, *Šešelj*, Case No IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with His Defence at ¶¶ 20–27. Radovan Karadžić's boycott of his first day of trial at the ICTY is only the most recent reminder as to why some form of backup counsel is necessary to allow the tribunals to function fairly and effectively. See Marlise Simons, *Karadžić to Boycott Start of War Crimes Trial*, NY Times (Oct 22, 2009).



the advantage of minimizing the tensions that may arise between counsel's duties to the client and to the court.<sup>239</sup>

A commentary to Article 14 of the ICC Code of Conduct could clarify that, although lawyers are generally supposed to follow clients' instructions about the objectives of representation, lawyers can and should disregard these instructions when the client's aim is to boycott the proceedings or otherwise bring the court into disrepute.<sup>240</sup> The comments could make clear that counsel would not be breaching their duties to the court if they seek to withdraw when the client discharges them, even if the discharge appears to be an attempt to boycott the proceedings. The comments (and perhaps parallel Regulations of the Court<sup>241</sup>) could further clarify that the court may not ask a lawyer to continue representing a client who has unequivocally terminated the lawyer's mandate. In that situation, the court could instead ask lawyers to assume representation under a special designation as standby counsel.

#### IV. IMPLEMENTING ETHICAL NORMS IN INTERNATIONAL CRIMINAL COURTS

As previous sections have suggested, the most appropriate method of implementing the ethical guidelines I have proposed would be through nonbinding comments to the ICC Code of Conduct. Even if the guidelines were to become broadly accepted and eventually adopted as binding, two principal reasons support gradual implementation. First, because international criminal defense attorneys come from diverse legal backgrounds and have limited interactions in international courts, it will take some time and effort for them to accept and apply new ethical guidelines at the international level. Second, neither attorneys nor courts have yet attempted to develop a distinct set of ethical guidelines consistent with the purposes of international criminal justice. Further deliberation on this topic will be necessary before attorneys and courts agree on concrete rules. For these reasons, it is best to begin the process of implementation by adopting nonbinding guidelines. They can then be reinforced

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<sup>239</sup> See notes 231–33 and accompanying text.

<sup>240</sup> Effectively, the commentary would bring together the lawyers' duties under Article 24(1) of the ICC Code of Conduct ("Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.") and Article 14(2)(a) of the same Code ("When representing a client, counsel shall: (a) Abide by the client's decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code . . .").

<sup>241</sup> These Regulations could supplement the current Regulation 78, which simply states that "[p]rior to withdrawal from a case, defence counsel shall seek the leave of the Chamber." ICC Regulations of the Court, ICC-BD/01-02-07 (Dec 18, 2007).

through training programs for lawyers and judicial references to the guidelines in court.<sup>242</sup>

The diverse legal backgrounds of defense attorneys are an important consideration in any effort to reform practices in international courts. Attorneys come to these courts from both inquisitorial and adversarial backgrounds and bring diverging conceptions of their professional obligations. Their adjustment to new procedures and practices has at times been relatively slow.<sup>243</sup> International attorneys do not all belong to the same bar association, and even court-specific professional associations, such as the Association for Defense Counsel (ADC) at the ICTY, have only recently emerged. Moreover, attorneys have had few opportunities to interact with one another because of frequent travels, language differences, and a high rate of turnover.<sup>244</sup>

Over time and in the course of repeated interactions with the international courts, defense attorneys' understandings of their professional obligations will likely begin to converge. At least at the ICTY, the ADC has facilitated this process since its creation in 2002, by providing a forum for the exchange of information and experiences, offering training programs, and even exercising independent disciplinary powers.<sup>245</sup> To give one example, the ADC has held training sessions on the topic of cross-examining victim-witnesses in a sensitive manner.<sup>246</sup> Still, at the ICTY and ICTR, the attorneys' beliefs about certain

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<sup>242</sup> For a discussion of different approaches to the implementation of ethical norms in the American context, consider Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N C L Rev 411 (2005); Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 Ann Surv Am L 7 (1990); Deborah L. Rhode, *Institutionalizing Ethics*, 44 Case W Res L Rev 665 (1994).

<sup>243</sup> McMorrow, 30 B C Intl & Comp L Rev at 148 (cited in note 12).

<sup>244</sup> See, for example, *id.* at 148–52; Walsh, 1 J Intl Crim Just at 494 (cited in note 96).

<sup>245</sup> International Criminal Tribunal for the Former Yugoslavia, *Association of Defence Counsel Formally Recognized by the ICTY*, Dec 19, 2002, online at <http://www.icty.org/sid/8041> (visited Nov 21, 2009); see Association of Defence Counsel Practising Before the International Criminal Tribunal for the Former Yugoslavia, *Objectives*, online at <http://www.adcicty.org> (visited Nov 21, 2009) (follow “ADC-ICTY” drop-down menu; then follow “Objectives” hyperlink) (listing “to oversee the performance and professional conduct of Defence Counsel” as one of the objectives of the ADC-ICTY).

<sup>246</sup> Turner, 48 Va J Intl L at 569 n 193 (cited in note 13). Some attorneys apparently dismiss the importance of these training sessions. They argue that the training is done only for strategic reasons—so that lawyers learn how to cross-examine victim-witnesses in a way that would be considered appropriate by the judges, who dislike aggressive cross-examination of such witnesses. Email from Kevin Jon Heller, Senior Lecturer, Melbourne Law School, to author, Sept 28, 2009. But even if done purely for strategic reasons, such training can still have a harmonizing effect on the practices and attitudes of international defense attorneys.

ethical questions continue to differ based on whether the lawyers come from inquisitorial or adversarial jurisdictions.<sup>247</sup>

In addition, international criminal law scholars, judges, and practitioners have yet to engage in a thorough discussion about the appropriate framework for legal ethics at international criminal courts. The Codes of Conduct adopted so far at international criminal courts largely reflect national ethical rules. The ICTY and ICTR Codes were influenced primarily by the American Model Rules,<sup>248</sup> and the ICC Code was in turn a blend of the ICTY and ICTR Codes and the ethical rules of inquisitorial systems.<sup>249</sup>

Some defense attorneys may resist the idea of engaging in a broad-based discussion of the goals of international criminal trials and the implications of these goals for ethical rules. Many defense attorneys are likely to disagree with the notion that their ethical duties should be significantly influenced by the broader political aims of international criminal justice.<sup>250</sup> But even if defense attorneys remain skeptical of the broader purposive approach advocated in this Article, they appear to accept the more concrete limits on their conduct. For example, in a survey of international criminal defense attorneys conducted by this author, about half of the respondents stated that they would refrain from impeaching a truthful witness.<sup>251</sup> Respondents also overwhelmingly appeared to

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<sup>247</sup> Turner, 48 Va J Intl L at 569 n 194 (cited in note 13) (reporting results from interviews with ICTY and ICTR defense attorneys and finding that attorneys from inquisitorial systems were less likely to say they would impeach a witness whom they believed to be testifying truthfully); Stefan Kirsch, *Draft Code of Conduct for Counsel Before the ICC* 12 (2004) (indicating resistance by lawyers from inquisitorial traditions to the notion that the client's interest should come "before counsel's own interests or those of any other person, organization or State").

<sup>248</sup> Michael Bohlander, *International Criminal Defence Ethics: The Law of Professional Conduct for Defence Counsel Appearing Before International Criminal Tribunals*, 1 San Diego Intl L J 75, 78 (2000).

<sup>249</sup> Walsh, 1 J Intl Crim Just at 497 (cited in note 96).

<sup>250</sup> In interviews and surveys conducted by this author, ICTY and ICTR defense attorneys consistently emphasized that their foremost duty was to provide a fair trial to their client and that any other goal of international criminal trials was incidental to their work. Turner, 48 Va J Intl L at 566–69 (cited in note 13).

<sup>251</sup> See *id.* at 569 n 194. Thirty-three respondents gave clear answers to this question. Eleven of the respondents were answering the question whether they would "impeach a witness whom [they] believe to be testifying truthfully." Another twenty-two were responding to a somewhat differently worded question—whether they would cross-examine aggressively a victim-witness whom they know to be testifying truthfully. These respondents were asked to assume that they "know this for a fact—whether because of something [their] client told [them] or because of documents that confirm the veracity of the witness's statements." The percentage of attorneys reluctant to impeach rose only slightly under the second formulation of the question. Whereas 45.5 percent of the attorneys said they would not impeach a witness they believed to be testifying truthfully, 50 percent of (different) respondents said they would refrain from cross-examining aggressively a victim-witness they know to be testifying truthfully. Attorneys coming from inquisitorial countries were much more willing to accept such a limitation on their cross-examination of adverse

support the idea that they should not present testimony that they believe is false.<sup>252</sup> Perhaps in reflection of this consensus, the Code of Conduct drafted by the International Criminal Bar (ICB) proposed that “[c]ounsel may refuse to offer evidence that counsel *reasonably believes* is false, irrelevant, or lacks probative value.”<sup>253</sup> As discussed earlier, this provision could be construed as permitting defense attorneys to refrain from introducing client testimony they reasonably believe is false. In short, defense attorneys may be more willing to accept the purposive approach advocated in this Article once they focus on the specific proposals for resolving ethical dilemmas in concrete situations.

Until international courts and practitioners have had sufficient opportunity to discuss and agree upon the demands that the unique purposes of the international criminal justice system place on legal ethics, the best approach is to enact nonbinding ethical guidelines. These guidelines could be developed by the same participants that helped draft the ICC Code of Conduct: the ICC Registrar, national and international bar associations and non-governmental organizations, and the Bureau of the Assembly States Parties to the ICC. Because the guidelines would not be binding, they are likely to be easier to adopt than formal amendments to the Code of Conduct.

Judges and professional associations could contribute to the implementation of the new guidelines. Judges can refer to them when they encounter inconsistent conduct in the proceedings before them. At the ICTY, judges were the main actors driving the development of shared ethical norms, through both formal and informal sanctions.<sup>254</sup> At the ICC, too, they could contribute to the inculcation of ethical norms through comments to counsel from the bench and in opinions.

Finally, professional associations of defense attorneys at international criminal courts can acclimate lawyers to the new norms through training programs, meetings, and disciplinary measures. Although ICC lawyers have not yet formed such an association, this is likely to occur as the court takes on more cases. The ICB is perhaps most likely to evolve into this role. In 2002, it was established to represent the interests of all international defense attorneys, but its

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witnesses. About two-thirds of inquisitorial attorney respondents stated that they would refrain from impeaching truthful witnesses, whereas only 38 percent of adversarial respondents accepted the same limitation.

<sup>252</sup> Although only thirteen respondents answered this question, twelve of them said they would not present client testimony that they believe is perjurious, and only one said that he or she would do so.

<sup>253</sup> International Criminal Bar, Code of Conduct and Disciplinary Procedure, Art 49(2) (2003) (emphasis added).

<sup>254</sup> McMorow, 30 BC Intl & Comp L Rev at 166 (cited in note 12).

focus is on lawyers practicing before the ICC.<sup>255</sup> As of November 2006, one-third of the ICC's list of counsel and half of counsel currently assigned to cases at the ICC were members of the ICB.<sup>256</sup> The organization aspires to become a more central institutional representative of defense interests at the ICC.<sup>257</sup> In the meantime, the ICC Office of Public Counsel for the Defence, which has set as its goal "to constitute an institutional memory for the Defence and to establish a resource centre" for defense counsel,<sup>258</sup> has the potential to help socialize and train defense attorneys in a common set of ethical practices.

If accepted and reinforced by ICC judges, disciplinary authorities, and professional associations, the nonbinding guidelines proposed in this Article could play a part in developing a shared set of professional ethical customs and understandings among ICC defense attorneys.<sup>259</sup> Because the guidelines would reflect the broader moral commitments of the international criminal justice system, they should appeal to ICC lawyers and judges. And since they aim to accommodate both adversarial and inquisitorial approaches to ethics, they have the potential to claim broad acceptance among defense practitioners.

If these ethical norms solidify over time, it is possible that international criminal courts could convert the flexible guidelines into binding rules. Development of legal ethics regulation at the national level has often followed a similar trajectory: from recommendations initially enforced primarily through a mix of informal pressure and occasional judicial comment, to more comprehensive codification of binding rules enforced by both courts and bar associations.<sup>260</sup> In the meantime, at this early stage of development of international legal ethics, a deliberative and gradual approach, consistent with the goals of international criminal justice system, appears most sensible.

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<sup>255</sup> Starr, *Ensuring Defense Counsel Competence at International Criminal Tribunals* at \*16 (cited in note 117).

<sup>256</sup> Virginia Lindsay, Executive Committee of the ICB, Address at the Fifth Session of the Assembly of States Parties to the Rome Treaty 1 (Nov 24, 2006), online at <http://217.148.84.127/bpi-icb/files/speech.pdf> (visited Nov 21, 2009).

<sup>257</sup> The organization has been holding and participating in training sessions for all counsel admitted to practice before the ICC. Moreover, it has engaged in regular consultations with the ICC Registry on issues of importance to ICC defense counsel. *Id.*

<sup>258</sup> International Criminal Court, Structure of the Court, Defence, The Office of Public Counsel for the Defence, online at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/Office+of+Public+Counsel+for+the+Defence> (visited Nov 21, 2009).

<sup>259</sup> Consider Fred C. Zacharias and Bruce C. Green, *Reconceptualizing Advocacy Ethics*, 74 Geo Wash L Rev 1, 5 (2005) (discussing the creation of a "professional conscience," or the implicit understanding by lawyers that their duties to the court and to the legal system impose certain limits on their decisions to engage in aggressive advocacy).

<sup>260</sup> See *id.* at 36–38; Moore, 1989 Ann Surv Am L at 15 (cited in note 242).

## V. CONCLUSION

Like their domestic counterparts, international criminal defense attorneys face difficult ethical questions when trying to resolve tensions between their duties to clients and to the court. In deciding whether to impeach a witness whom they know to be truthful, for example, attorneys must balance their duty to represent their client aggressively against their duties not to mislead the court or unduly burden witnesses. Similar conflicts arise when a client wants to testify untruthfully, decides to admit guilt falsely, or seeks to boycott the proceedings.

At international criminal courts, such questions should not be resolved solely by reference to domestic ethical traditions. These traditions often conflict in their approaches to key ethical dilemmas facing criminal defense attorneys. More importantly, domestic approaches sometimes fail to take into account the special goals of international criminal trials, which are broader than the goal of determining culpability according to fair procedures. These goals include compiling an accurate historical record of the crimes, spreading a message about the importance of human rights, and giving victims a voice and a sense of closure.

This Article has proposed an approach that recognizes and reflects the unique purposes of international criminal trials. This purposive approach respects the diversity of legal traditions that have helped shape the international courts, as well as the professional experiences of lawyers who practice there. It draws on the most appropriate practices from both the adversarial and inquisitorial systems to create ethical guidelines best suited to the objectives of the forum in which they are applied. An understanding of these distinctive purposes is the best foundation for a system of ethics that is both effective and capable of widespread acceptance.